

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 132.

THE SEABOARD AIR LINE RAILWAY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE 12, 1920.

(26,566)

(26,585)

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I. *Petition and Appendix.*

Filed June 27, 1914.

In the Court of Claims.

No. 32852.

THE SEABOARD AIR LINE RAILWAY

vs.

THE UNITED STATES.

Petition.

To the Honorable Chief Justice and Judges of the Court of Claims:

Your petitioner, the Seaboard Air Line Railway, respectfully shows to your honors the following-stated facts:

I.

Petitioner is a corporation organized under the laws of the State of Virginia. It operates, and at the times hereinafter stated, did operate, a system of railways in the States of Virginia, North Carolina, South Carolina, Georgia, Florida and Alabama. Under arrangements closed by its proper officers with the authorized officers of the Post-office Department petitioner was at said times and it still is transporting the United States mails over mail routes on said railways, established by the postal authorities. In an appendix hereto said postal routes are severally described by the numbers given to them by the postal authorities.

II.

By acts of Congress approved respectively, July 7, 1838 (5 Stat., 282), January 25, 1839 (5 Stat., 314), and March 3, 1845 (5 Stat., 738), all railways within the limits of the United States, then or thereafter to be completed, were declared to be post-routes and the Postmaster-General was authorized and empowered to enter into contracts with the companies operating them for the transportation of the mails upon them at prices which would "insure, as far as may be practicable, an equal and just rate of compensation, according to the service performed," but he was forbidden to "allow more than three hundred dollars per mile, per annum, to any railroad company in the United States, for the conveyance of one or more daily mails upon their roads," except that if one-half the service was to be performed "in the night session" he might allow 25 per cent in addition to the aforesaid maximum rate, and except further that

if he should find it necessary to have "more than two mails daily" conveyed over any railroad route he might allow such additional compensation as he might "think just and reasonable, having reference to the service performed and the maximum rate of allowance established by this act."

III.

In the period from 1845 to 1867 all railway companies of the United States carried the mails by virtue of separate and individual contracts or agreements with the Post-office Department. The weight or size of the mails was not always reported to said Department, and the compensation was arrived at and determined arbitrarily without attempt or purpose to fix uniform and equal rates according to the service performed. In the year 1867 the Post-office Department, with the purpose of establishing a uniform rate of compensation for all similar railway mail transportation, issued a circular requiring that weighing scales be placed on all railway trains carrying mails, and that all mails carried on each train be weighed for "thirty consecutive working days." The intent of said circular was that the mails should be weighed for a period of five weeks, and it was put into effect in that way. Having thus ascertained the total weight for each route the Department divided it by thirty and determined and declared the result to be the "average weight of mails per day" carried over said route without regard to the trips or the days or the number of days by and upon which the mails were actually carried, and thereafter the compensation allowed and agreed to for service on said route was based on said "average weight of mails per day." To this practice the railway companies engaged in mail transportation agreed, and it was pursued without change until July 1, 1873.

IV.

The act of Congress approved June 8, 1872, entitled "An act to revise, consolidate and amend the statutes relating to the Post-office Department," contained a section in the words below (17 Statutes at Large, p. 309):

"That the Postmaster-General shall arrange the railway routes on which the mail is carried, including those in which the service is partly by railway and partly by steamboat, into three classes, according to the size of the mails, the speed at which they are carried, and the frequency and importance of the service, so that each railway company shall receive, as far as practicable, a proportionate and just rate of compensation, according to the service performed."

V.

The Postmaster-General had found it difficult, with the information then afforded him, to give full effect to said laws relative to compensation for railway mail service, and he communicated and

4 recommended to the Forty-second Congress, in the form of a bill, a more specific plan for ascertaining the quantity of mail carried on each railway. Said draft was adopted by Congress and became part of an act approved March 3, 1873, making appropriation for the expenses of the Post-office Department for the fiscal year ending June 30, 1874, and enactment being in the words below (Senate Report 478, 43d Congress, 1st Session, p. 18):

"For increase of compensation for the transportation of mails on railroad routes upon the condition and at the rates hereinafter mentioned, five hundred thousand dollars, or so much thereof as may be necessary: Provided, that the Postmaster-General be, and he is hereby, authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned, to wit: That the mails shall be conveyed with due frequency and speed; that sufficient and suitable room, fixtures and furniture, in a car or apartment properly lighted and warmed, shall be provided for route agents to accompany and distribute the mails, and that the pay per mile per annum shall not exceed the following rates, namely: on routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars; five hundred pounds, seventy-five dollars; one thousand pounds, one hundred dollars; one thousand five hundred pounds, one hundred and twenty-five dollars; two thousand pounds, one hundred and fifty dollars; three thousand five hundred pounds, one hundred and seventy-five dollars; five thousand pounds, two hundred dollars, and twenty-five dollars additional for every additional two thousand pounds, the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working days, not less than thirty, at each times, after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the results to be stated and verified in such form and manner as the Postmaster-General may direct."

17 Stat., 558.

5 Said enactment remained in effect until the passage of an act of Congress approved March 3, 1905 (33 Statutes at Large, p. 1082), providing for the expenses of the postal service for the year ending June 30, 1906. By that act the Postmaster-General was directed to ascertain the average weight of mails on each railroad route by causing the mails to be weighed for not less than ninety (90) "successive working days," after June 30, 1905, not less frequently than once in four years. Said enactments of June 8, 1872, and March 3, 1905, are still in effect and under them and said act of March 3, 1873, the mails transported by petitioner on said routes have been weighed for the terms respectively prescribed once in each four years.

VI.

Both before and since the passage of said act of March 3, 1873, and to the present time, trains were operated by many of the railway

companies of the United States on the secular days alone, and many trains operated by other companies on Sunday, corresponding with trains which carried the mails on secular days, did not carry any mails. The delivery of a large part of the mails over those lines where none were carried on Sunday was necessarily retarded one day or more; and additional delay frequently resulted from the accumulation of mails thus arising through the first secular days. As a rule delivery of the mails was, and it still is, much more even and prompt throughout the week when trains were and are operated, and mails carried, every day.

VII.

Said provision in the act approved June 8, 1872, was practically a copy of a clause in an act of Congress approved March 3, 1845 (5 Statutes at Large, p. 738). Beginning in 1867, for the purpose of fixing the compensation of the railroad companies for contract periods of four years, the mails were weighed, or the weights thereof were estimated, by the railroad companies themselves, under directions of the Postmaster-General, for thirty consecutive working days designated by him, and also for all Sundays, intervening
6 among such working days, on which mails were transported; but, without regard to the numbers of days in the week on which the trains were operated and mails carried, the aggregate weights so ascertained were divided by the full number of secular days, and those alone, included in the weighing periods. The act of Congress approved March 3, 1875, making appropriations for expenses of the Post-office Department for the fiscal year terminating on June 30, 1876, contained a provision in the words below, relating to the duties of the Second Assistant Postmaster-General:

"And he is hereby directed to have the mails weighed as often as now provided by law by the employees of the Post-office Department, and have the weights stated and verified to him by said employees under such instructions as he may consider just to the Post-office Department and the railroad companies."

18 Statutes at Large, p. 341.

In 1876 and thereafter the weighings of the mail for the purpose of fixing the compensation of the railroad companies were conducted by the Post-office Department, but until 1907 there was no change in the plan of weighing and of computing average weights; regardless of the number of days on which trains were operated and mails carried, the mails were weighed on all the days of service falling among the designated working days and the aggregate weights for the weighing periods were divided by the full number of secular days in such periods; and with respect to all transportation of the mails done to June 30, 1907, petitioner and the other mail-carrying railways of the United States have received compensation for weights determined by such use of the secular days alone as a divisor.

The Second Assistant Postmaster-General, in his report for the year 1878 (page 61), said:

"In 1867 the service rendered by railroad companies was gauged by the system substantially embodied in the act of 1873."

7 Said report was communicated to Congress as a part of the report of the Postmaster-General for said year.

VIII.

One of the purposes of said enactments of June 8, 1872, March 3, 1873, and March 3, 1875, was that railroad companies transporting the mails every day in the week, and thereby furnishing a better service, should not receive less compensation for the same aggregate weights of mail carried during the same periods than companies which transported the mails a less number of days in the week. When preparing to put into effect said acts of Congress approved March 3, 1873, and March 3, 1875, the postal authorities conferred with many managers of railroad companies and agreed that the purposes of Congress could not be effected and justice done to the railroad companies except by said existing plan of weighing the mails for every day of service included in the weighing periods and dividing the total weights by the full number of secular days included in said periods. In 1875 the Postmaster-General reported to Congress that the pay of all railroad companies was then fixed on the basis of weights carried and that the Post-office Department and the railroad managers were in full agreement upon the methods of weighing and of determining average weights.

IX.

While construing and applying the laws in the way hereinbefore stated, officers of the Post-office Department at times expressed their disapproval of the rule so established for determining the rates of compensation to be allowed. The Postmaster-General, in a report for the year ending June 30, 1881, and the Second Assistant Postmaster-General, in a report for the year ending June 30, 1882, expressed unfavorable views on the existing law in said particular. In a report for the year ending June 30, 1884, the Postmaster General repeated these criticisms, and on his recommendation a bill was introduced in the House of Representatives to strike out the word
8 "working" from the phrase "working days" in said act approved March 3, 1873; but no action was taken by the House on said bill. In September, 1884, the Postmaster-General also prepared an order in the words following:

"Order No. 44. Hereafter when the weight of mails is taken on the railroad routes performing service seven days per week the whole number of days the mails are weighed, whether thirty or thirty-five, shall be used as a divisor for obtaining the average weight per day."

Deferring the enforcement of said order, the Postmaster-General addressed a communication to the Attorney-General in which he showed the operation of the law in said particular, as construed by himself and his predecessors, and inquired the opinion of the Attorney-General as to the proper construction of the same. In a reply of date October 31, 1884, the acting Attorney-General communicated to the Postmaster-General his opinion that said construction of said act, on which the postal authorities had been and were acting, was correct, and that any departure from that construction "would defeat the intention of the law" (18 Attorney-General's Opinions, p. 71). In consequence of said opinion of the Attorney-General the Postmaster-General did not put his said order into effect.

X.

Complying with a resolution adopted by the Senate on January 19, 1885, the Postmaster-General, on January 21, 1885, transmitted to the Senate a letter in which he gave "a documentary history of the railway mail service from its origin in 1834 to the present time." Said communication contained the following explanation of the existing system of weighing the mails and computing daily averages:

"Some little controversy at one time existed as to the justice of the present methods of obtaining the average daily weight to be taken as a basis for determining the annual pay, but a little examination made it clear that no other way of proceeding could be so just as that now in vogue.

* * * * *

"The present rule is, on those roads carrying the mails six times a week to weigh the mails on thirty consecutive days on which the mails are carried, which would cover a period of thirty-five days; dividing the aggregate thirty weighings by thirty will give the daily average. On those roads carrying the mails seven times per week the weighing is done for thirty-five consecutive days (including Sundays) and the aggregate divided by thirty for a basis of pay.

"It is evident that the period during which the weighing is continued covers, in both cases, all the mails carried for thirty five days. If, in the second case, we should take our basis from an average obtained by dividing the aggregate weight by thirty-five we should commit the absurdity of putting a premium upon inefficiency, for evidently if the Sunday train were cut off we should virtually have the same mails less frequently carried, and therefore with a higher daily average, and therefore a higher pay basis than in the case where the seventh train was run and the greater accommodation rendered.

"The present method gives no additional pay for the additional seventh train, but the other method would cause a reduction on account of better service, and practically would operate as a fine on all those roads carrying the mails daily, and including Sunday."

Senate. Ex. Doc. 40, 48th Congress, 2d Session.

XI.

During the thirty-four years following said enactment of March 3, 1873, rates paid to railway companies, under said acts for transporting the mails, the apportionment of pay between relatively small and relatively large quantities of mail and said plan established and applied in determining the average weights for which the carriers should be paid were many times discussed by committees of both houses of Congress, by commissions appointed by Congress to investigate and make recommendations regarding the postal service and by chairmen of committees and other members in open session.

XII.

At the second session of the Fifty-ninth Congress the Committee of the House of Representatives on Post-offices and Post-roads prepared a bill, which was passed after much debate and amendment in both houses, entitled "An act making appropriations for the fiscal year ending June 30, 1908, and for other purposes," being approved on March 2, 1907. In said bill said committee inserted a provision that the Postmaster General should cause the mails to be weighed once in each four years period, commencing June 30, 1907, for not less than one hundred and five (105) "successive days" and that in ascertaining the daily average weight of mails the total for said weighing period should be divided by said full number of days. In introducing said bill in the House said committee filed a report in which it set out the history of said divisor theretofore used in fixing the average weights of the mails, as hereinbefore recited, and the chairman of the committee spoke at length on said subject and told the House of the conditions which had caused the establishment of said divisor, of said report of the Postmaster General for 1875, of said contemplated order of the Postmaster-General of September, 1884, the adverse opinion of the Attorney-General thereon and the cancellation thereof. After debate occupying parts of five days the House rejected said provision in the appropriation bill. Subsequently during said session said plan reported by the committee for calculating the weights of the mails was three times brought before the House and each time the House rejected it.

XIII.

By an act of Congress approved July 12, 1876, first effective for the fiscal year ending June 30, 1877, the rates of pay with respect to weight of mails authorized by said act of March 3, 1873, were reduced ten (10) per cent; and by an act approved on July 17, 1878, a reduction of five (5) per cent was made from the rates resulting from the act of July 12, 1876. Thereafter the law was not changed with regard to the rates to be paid for carrying the mails until the passage of said act of March 2, 1907. The text of

the part of said act which relates to the rates of pay with respect to weight of mails is as follows (34 Statutes at Large, p. 1212):

"The Postmaster-General is hereby authorized and directed to readjust the compensation to be paid from and after the first day of July nineteen hundred and seven, for the transportation of mail on railroad routes carrying their whole length an average weight of mail per day of upward of five thousand pounds by making the following changes in the present rates per mile per annum for the transportation of mail on such routes, and hereafter the rates on such routes shall be as follows: On routes carrying their whole length an average weight of mail per day of more than five thousand pounds and less than forty-eight thousand pounds the rate shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds, and on routes carrying their whole length an average weight of mail per day of more than forty-eight thousand pounds the rates shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds up to forty-eight thousand pounds, and for each additional two thousand pounds in excess of forty-eight thousand pounds at the rate of nineteen dollars and twenty-four cents upon all roads other than land-grant roads, and upon all land-grant roads the rate shall be seventeen dollars and ten cents for each two thousand pounds carried in excess of said forty-eight thousand pounds.

XIV.

With respect to the rates which should be applied to the average weights of mail the Postmaster-General, when undertaking the computations required by said act of Congress approved March 3, 1873, decided that the act was intended to mean, and did mean, that there should be paid the identical rates named therein. All railway companies engaged in transportation of the mails accepted said rule as determining the amounts of their compensation and by this rule the compensation received by them for each succeeding four-years period has been computed. In putting into effect said act of Congress approved July 2, 1876, the Postmaster-General decided that it was necessary to adopt as bases the identical rates which had been established since 1873 and which the Department was paying to railroad companies under the quadrennial agreements then in force; and in putting into effect said act approved June 17, 1878, he decided that it was necessary to adopt as bases the identical rates which had been established and which said Department was paying under said act and the quadrennial agreements which had gone into effect on July 1, 1877. In that sense said acts of Congress were applied, with the consent of all the railway companies concerned, in all readjustments of compensation for said services made since 1876 and 1878, respectively. In putting into effect said act of Congress, approved March 2, 1907, the Postmaster-General, again, began by applying the identical rates that were designated in said act of March

3, 1873, and then made those reductions which were prescribed respectively by said acts of 1876, 1878 and 1907.

XV.

Notwithstanding said refusal of Congress, narrated in paragraph XIII hereinbefore, to change the law with respect to the ascertainment of average weights of mail, the Postmaster-General decided that he would, in the actual practice, include in his divisors all Sundays on which the mails were weighed, and he to this end, on March 2, 1907, and June 7, 1907, respectively, issued orders the text of which follows:

"Order No. 165. That when the weight of mail is taken on railroad routes the whole number of days the mails are weighed shall be used as a divisor for obtaining the average weight per day.

"Order No. 412. Ordered, that Order 165, dated March 2, 1907, be, and the same is hereby, amended to read as follows:

13 "That when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day."

Petitioner, by its authorized officers, on receipt of copies of said orders, sent to the Second Assistant Postmaster-General protests in writing against the application thereof to its traffic on the postal routes for which the quadrennial arrangements were to be renewed at that time; and in each of the years 1908, 1909 and 1912, when such arrangements were to be renewed as to other postal routes, it made the same protest again. Said protests were made in connection and with reference to notices, on a printed form, prepared by the Second Assistant Postmaster-General for statement of the distances between all stations on said routes by which compensation for carrying the mails was to be computed for the respective four-years period next following. In returning said notices petitioner consented, subject only to said protests, to perform, and it has ever since performed the service so stipulated for.

XVI.

Disregarding said protests, the Postmaster-General during February, March, April and May, of 1908, 1909 or 1912, caused the mails to be weighed on each of said routes for one hundred and five (105) successive days, including Sundays, and thereafter in calculating the daily averages of the mails, divided the aggregate of the weights so ascertained by one hundred and five (105). For the respective periods stated in said appendix said new divisor has been applied to petitioner's service on its said postal routes and it has received compensation so calculated and no more.

Petitioner says that said change in the method of calculating its compensation was and is unlawful, and it therefore prays judgment

14 against the United States in the sum of two hundred and
twenty-two thousand, one hundred and seventy-nine dollars
and forty cents (\$222,179.40), the aggregate of the sums
thereby withheld from it, as shown by said appendix hereto; the same
being still entirely unpaid.

THE SEABOARD AIR LINE RAILWAY,
By BENJ. CARTER,

Its Attorney in Fact.

F. CARTER POPE, *of Counsel.*

DISTRICT OF COLUMBIA, ss:

Before me, Francis L. Neubeck, a Notary Public in and for said District, Benj. Carter, whose name is written as a part of the signature to the foregoing petition, made oath on this 26th day of June, 1914, that the allegations of said petition are true to the best of his knowledge, information and belief.

BENJ. CARTER.

Subscribed and sworn to before me the day above written.

FRANCIS L. NEUBECK,
Notary Public.

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APPENDIX.

Route.	No.	Period of reductions.	Compensation.		
			Under Order 412.	By divisor of 90.	Under- payment.
118003	{	July 1, 1908—June 30, 1912	\$45,476.44	\$49,642.88	\$4,166.44
		July 1, 1912—May 31, 1914	24,520.14	27,061.81	2,541.67
118010	{	July 1, 1908—June 30, 1912	224,406.92	249,703.72	25,296.80
		July 1, 1912—May 31, 1914	223,595.24	250,567.28	26,972.04
118025	{	July 1, 1908—June 30, 1912	2,015.44	2,156.92	141.48
118033	{	July 1, 1912—May 31, 1914	2,916.92	3,032.80	115.88
118038	{	July 1, 1908—June 30, 1912	262,398.00	281,359.08	17,961.08
		July 1, 1912—May 31, 1914	160,107.34	174,275.84	14,168.50
118041	{	July 1, 1908—June 30, 1912	8,303.32	9,018.32	715.00
		July 1, 1912—May 31, 1914	5,280.36	5,582.85	302.49
118059	{	July 1, 1908—June 30, 1912	62,191.44	64,966.72	2,775.28
		July 1, 1912—May 31, 1914	29,422.97	30,752.88	1,329.91
118065	{	July 1, 1908—June 30, 1912	36,532.92	39,790.68	3,257.76
		July 1, 1912—May 31, 1914	19,603.84	21,513.30	1,909.46
118082	{	July 1, 1908—June 30, 1912	1,015.64	1,081.20	65.56
		July 1, 1912—May 31, 1914	537.05	575.97	38.92
120012	{	July 1, 1908—June 30, 1912	380,829.92	414,594.24	33,764.32
		July 1, 1912—May 31, 1914	207,171.60	226,962.36	19,790.76
121020	{	July 1, 1908—June 30, 1912	4,361.56	4,599.96	238.40
121050	{	July 1, 1908—June 30, 1912	174,388.28	181,317.88	6,929.60
		July 1, 1912—May 31, 1914	76,347.37	83,536.27	7,188.90
121062	{	July 1, 1908—June 30, 1912	70,846.80	78,270.96	7,424.16
		July 1, 1912—May 31, 1914	44,658.85	46,798.30	2,139.45
121063	{	July 1, 1908—June 30, 1912	19,154.76	20,669.80	1,515.04
		July 1, 1912—May 31, 1914	8,462.94	9,046.64	583.70
121067	{	July 1, 1908—June 30, 1912	6,208.64	6,743.28	534.64
		July 1, 1912—May 31, 1914	2,558.83	2,661.30	102.47
121090	{	July 1, 1908—June 30, 1912	1,845.08	1,955.56	110.48
		July 1, 1912—May 31, 1914	953.56	1,025.55	71.99
123001	{	July 1, 1908—June 30, 1912	97,647.60	103,481.92	5,834.32
		July 1, 1912—May 31, 1914	54,284.38	57,404.52	3,120.14
123006	{	July 1, 1908—June 30, 1912	106,218.36	113,044.94	6,826.58
		July 1, 1912—May 31, 1914	54,706.77	57,293.02	2,586.25
123011	{	July 1, 1908—June 30, 1912	11,887.36	12,998.61	1,111.25
		July 1, 1912—May 31, 1914	5,167.68	5,612.70	445.02
123019	{	July 1, 1908—June 30, 1912	11,679.96	12,653.32	973.36
		July 1, 1912—May 31, 1914	6,431.72	6,991.83	560.11
123028	{	July 1, 1908—June 30, 1912	17,095.88	18,248.51	1,152.63
		July 1, 1912—May 31, 1914	11,265.67	12,324.35	1,058.68
123040	{	July 1, 1908—June 30, 1912	828.24	875.25	47.01
		July 1, 1912—May 31, 1914	397.48	427.67	30.19
123052	{	July 1, 1908—June 30, 1912	9,633.52	10,081.40	447.88
123055	{	July 1, 1908—June 30, 1912	2,983.00	3,191.17	208.17
		July 1, 1912—May 31, 1914	1,221.13	1,286.41	65.28
123060	{	July 1, 1908—June 30, 1912	309.92	331.68	21.76
114025	{	July 1, 1909—June 30, 1912	128,949.21	144,487.80	15,538.59
Totals			\$2,627,820.05	\$2,849,999.45	\$222,179.40

II. *General Traversa.*

Court of Claims.

No. 32852.

THE SEABOARD AIR LINE RAILWAY

VS.

THE UNITED STATES.

No demurrer, plea, answer counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general travers is entered as provided by Rule 34.

III. *Argument and Submission of Case.*

On January 22, 1918, the case was argued by Mr. Benjamin Carter, for the claimant, and by the Solicitor General, Mr. John W. Davis, and Assistant Attorney General, Mr. Huston Thompson, for the defendants.

On January 23, 1918, the argument was concluded by Mr. Carter and the case was submitted.

IV. *Findings of Fact, Conclusion of Law, and Appendix.*

Filed March 11, 1918.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

Plaintiff is a corporation organized under the laws of the State of Virginia, and operates and for a time prior to July 1, 1907, did operate a system of railways in the States of Virginia, North Carolina, South Carolina, Georgia, Florida, and Alabama, over which it has transported the mails under contracts with the Postmaster General on the following designated routes established by the Postmaster General:

Route No.	Termini.	Period.
118003	Wilmington and Hamlet, N. C.....	July 1, 1908, to June 30, 1916.
118010	Norlina and Hamlet, N. C.....	July 1, 1908, to June 30, 1912.
118010	Acca (n. o.), Va., and Hamlet N. C.....	July 1, 1912, to June 30, 1916.
118025	Louisburg and Franklinton, N. C.....	July 1, 1908, to June 30, 1916.
118033	Boykins, Va., and Lewiston, N. C.....	Do.
118038	Hamlet, N. C., and Atlanta, Ga.....	Do.
118041	Henderson and Durham, N. C.....	Do.
118059	Portsmouth, Va., and Norlina, N. C.....	Do.
118065	Monroe and Rutherfordton, N. C.....	Do.
118082	Oxford and Dement (n. o.), N. C.....	July 1, 1908, to June 30, 1912.
118082	Oxford and Dickerson Station (n. o.), N. C.	July 1, 1912, to June 30, 1916.
120012	Hamlet, N. C., and Jacksonville, Fla....	July 1, 1908, to June 30, 1916.
121020	Cartersville and Rockmart, Ga.....	Do.
121050	Savannah, Ga., and Montgomery, Ala..	Do.
121062	Atlanta, Ga., and Birmingham, Ala.....	July 1, 1908, to June 30, 1912.

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Route No.	Termini.	Period.
121062	Western & Atlantic Junction (n. o.), Ga., and Birmingham, Ala.....	July 1, 1912, to June 30, 1916.
121063	Columbus and Albany, Ga.....	July 1, 1908, to June 30, 1916.
121067	Abbeville and Ocella, Ga.....	Do.
121060	Lawrenceville and Loganville, Ga.....	Do.
123001	Baldwin and Tampa, Fla. (all land grant)	Do.
123006	Jacksonville and River Junction, Fla. (all land grant)	Do.
123011	Wildwood and Orlando, Fla.....	Do.
123019	Waldo and Cedar Keys, Fla. (all land grant)	Do.
123028	Turkey Creek and Sarasota, Fla.....	Do.
123040	Monticello and Drifton, Fla.....	Do.
123052	Starke and Wannee, Fla.....	July 1, 1908, to June 30, 1912.
123052	Starke and Bell, Fla.....	July 1, 1912, to June 30, 1916.
123055	Fernandina and Yulee, Fla. (all land grant)	July 1, 1908, to June 30, 1916.
123060	Manatee Junction (n. o.), and Braden- town, Fla.....	Do.
114025	Acca (n. o.), Va., and Norlina, N. C.....	July 1, 1909, to June 30, 1912.

In the construction of the above lines of railroads the plaintiff was aided by grant of lands made thereto by the United States in the cases of routes Nos. 123001, 123006, 123019, and 123055, and was not aided by any grant of lands or other property made thereto by the United States in the other cases.

Routes Nos. 118003, 118010, 118038, 118059, 118065, 120012, 121020, 121050, 121062, 121063, 121067, 123001, 123006, 123011, 123019, 123028, 123040, 123055, 123060, and 114025 were what are called seven-day routes; the others were called six-day routes.

II.

In 1867 the mails were being conveyed under agreements made between the railroad companies and the Post Office Department in pursuance of the act of Congress of 1845, and were thereafter carried

up to the time of the passage of the act of 1873 under similar agreements. At the latter date a large majority of the railroad postal routes carried the mails six days per week, so as to make six round trips per week, and did not carry mails on Sundays. A much smaller number of railroad postal routes carried mails one or more times each day in the week so as to make not less than seven round trips per week, and these carried mails on Sundays.

After Order No. 412 was promulgated and became effective in 1907 the service performed by plaintiff on the routes involved in its claim was on six days in the week during the period July 1, 1908, to June 30, 1916, on routes Nos. 118025, 118033, 118041, 118082, 121090, and 123052, the aggregate annual pay for which was \$7,286.86 during the period July 1, 1908, to June 30, 1912, and \$7,381.45 during the period July 1, 1912, to June 30, 1916; and seven times a week during the period July 1, 1908, to June 30, 1916, on routes Nos. 118003, 118010, 118038, 118059, 118065, 120012, 121020, 121050, 121062, 121063, 121067, 123001, 123006, 123011, 123019, 123028, 123040, and 123055, and, during the period 20 of July 1, 1908, to June 30, 1912, on routes Nos. 123060 and 114025 the aggregate annual pay for which was \$383,769.09 during the period from July 1, 1908, to June 30, 1912, and \$485,647.09 during the period from July 1, 1912, to June 30, 1916; and seven days in the week on route No. 114025 during the period from July 1, 1908, to June 30, 1912, the annual pay for which was \$16,883.52 during the period from July 1, 1908, to June 30, 1909, and \$42,983.07 during the period from July 1, 1909, to June 30, 1912.

After the enactment of the act of 1873 the mails were continued to be carried over railroad postal routes under agreements between the Post Office Department and the railroad companies concerned, and were being so carried at the date of order No. 412, June 7, 1907. At the date of the latter order the relative proportion of seven and six days' carriage of mails had changed, and over a majority of the railroad postal routes mails were being carried every day in the week.

III.

For a long time previous to 1867 mails were carried by railroad companies under separate contracts between the respective companies and the Post Office Department under authority of the acts of Congress referred to by the Postmaster General in his report for 1867, namely, those approved July 7, 1838, 5 Stat., 283, January 25, 1839, 5 Stat. 314; and March 3, 1845, 5 Stat., 732. The last-named act provided that to insure, as far as may be practicable, an equal and just rate of compensation, according to the service performed, among the several railroad companies in the United States for the transportation of the mail it shall be the duty of the Postmaster General to arrange and divide the railroad routes, including those in which the service is partly by railroad and partly by steamboat, into three classes, according to the size of the mails, the speed with which they are conveyed, and the importance of the service; and it shall be lawful for him to contract for conveying the mail with any such railroad company, either with or without advertising for such con-

tract. Maximum rates were fixed for service rendered by the three classes, respectively, and the Postmaster General was authorized, in case he should not be able to conclude a contract for carrying the mail on any of such railroad routes at a compensation not exceeding the maximum rates, or for what he might deem a reasonable and fair compensation for the service to be performed, to separate the letter mail from the residue of the mail and to contract, either with or without advertising, for conveying the letter mail over such route, by horse, express, or otherwise, at the greatest speed that can reasonably be obtained, and also to contract for carrying over such route the residue of the mail, in wagons or otherwise, at a slower rate of speed.

With reference to the ascertainment of the "size of the mails" in order to make the classification authorized by the last-named act, the above-mentioned report states as follows:

"In order to make such an arrangement and classification of railroad routes as the act last mentioned contemplates, there is an obvious necessity for accurate and reliable information as to the 'size of the mails' they severally convey. Yet, until recently, no measures
21 were ever taken to procure from any considerable proportion of the roads in the service of the department, statements of the amounts of mail matter conveyed by them, respectively. In February and March last, however, a railroad weight circular, (a copy of which is hereto annexed) was issued and addressed to the proprietors of each railroad route, requesting them to "weigh all the through mails and way mails" conveyed in both directions to and from every station for thirty consecutive working days, commencing on all roads east of the Rocky Mountains on the 1st and on all roads west on the 15th of April, 1867, and report the results to the department in a prescribed tabular form annexed to the circular, and to return also a description of the accommodations provided for mails and agents, with the dimensions, fixtures, and furniture of the car or apartment allotted to their use, and a statement of the number of trips per week in each direction.

* * * * *

"No general systematic revision and readjustment of these rates, based upon the returns received, has yet been attempted, but in a number of cases of disagreement between the department and railroad companies the returns have been used as a guide to a proper settlement of the dispute; and, as the terms of existing contracts expire and it becomes necessary to enter into new engagements, it is expected that such changes will from time to time be made as will eventuate ultimately in the nearest practicable approach to a perfect classification of railroad routes and graduation of their pay according to the comparative value and importance of the service they perform."

The result furnished data for each route respecting the whole weights of mails carried in each direction, the total weight and the average weight carried the whole distance for the 30 consecutive working days, and the average weight carried the whole distance per day, ascertained by dividing such average total weight by 30, the

size of mail car or apartment, and the number of trips performed per week.

In the years 1868, 1869, 1870, 1871, and 1872 revisions and readjustments of the rates of pay on railroad routes were made under the terms of the law of 1845 according to classifications based upon the returns of the weight of the mails conveyed and the accommodations provided for the mails and the agents of the department, ascertained in the manner above stated. (See Reports of Postmaster General, 1868, p. 10, Table E, pp. 66, 67; 1869, pp. 10, 11, Table F, pp. 86, 87; 1870, pp. 10, 11, Table E, pp. 82, 83; 1871, p. x, Table E, pp. 48, 49; 1872, pp. 10, 11, Table E, pp. 100, 101.)

In the reports of the Postmaster General for the years 1869, 1870, and 1871 he called attention to complaints on the part of railroad companies to the inadequacy of compensation for carrying the mails, and in his report of 1870 it was stated that many of them have refused and still refuse to enter into contracts with the department, alleging that they would bind themselves by a permanent arrangement at the present prices, and that as a consequence on many of the important roads the mails were carried as suited the convenience of the companies.

In the revision and consolidation of the statutes relating to the Post Office Department in 1872, 17 Stat. L., 309, certain provisions of the law of 1845 were changed.

22 The following year Congress passed the act of March 3, 1873, which is set out in the appendix to these findings.

A part of the act of 1873 was embodied in the Revised Statutes as section 4002.

Prior to July 1, 1876, the weighing was done by the railroad companies transporting the mails as above set forth. Subsequent to that time, by virtue of an act of Congress approved March 3, 1875, the weighing was done by Government agents under the direction of the Postmaster General. (See Appendix.)

IV.

Subsequent to the act of 1873 the Postmaster General for the purpose of putting said act into effect, adopted the division of the United States, theretofore made into four sections, and had the mails weighed and the annual compensation for a term of four years stated for all railway routes in one section each year.

Before the compensation was stated for any route the Postmaster General secured from the company performing the service an agreement in the form following:

"The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad mail service."

After the weighing of the mails was completed and the compensation for the transportation thereof was fixed for the term the Postmaster General caused to be sent to each railroad company a notice in the form following:

"The compensation for the transportation of mails on route No. ———, between ——— and ———, has been fixed from July 1, 18—, to June 30, 18—, under act of March 3, 1873, upon returns showing the amount and character of the service for 30 successive working days, commencing ———, 18—, at the rate of \$——— per annum, being \$——— per mile for ——— miles.

This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week."

After the passage of said act of March 3, 1873, whereby the weighings were required to be made by employees of the department under instructions of the Postmaster General as above stated, the mails were weighed for 30 successive days, exclusive of Sundays, on routes not carrying mails on Sundays, and on 35 successive days, inclusive of Sundays on routes carrying mails on Sundays, the Sunday weights being reported with the Monday weighings. The totals of the weighings in each class were used as a dividend, and in both classes 30 was used as a divisor. The quotient so obtained was treated as the average weight of mails per day carried.

From and after 1873 and until Order No. 412 became effective, it was the practice of the Postmaster General, when computing the compensation payable to railroad carriers for service to be performed in transporting the mails over the several routes, to apply to the quotient obtained as above set forth, or by the act of 1905 which increased the minimum weighing days, the maximum rate allowed by statute,

23 except in the cases of certain routes where pay was fixed, without weighing, at the lowest maximum rate specified in the current law; "lap-service" routes, being cases where two different routes coincide in part over the same line of railway and the pay is adjusted on a reduced sliding scale (P. L. & R., 1913, sec. 1325); "blue-tag" routes, over which periodical matter is transported in sacks marked with a blue tag, in fast freight trains, at less than maximum rates; and "equalization rates," where competition on basis of shorter mileage occurs between carriers, and the elder road possessed of the longer mileage and the mail contract is encouraged to retain the route, but at compensation based on the lesser mileage of the junior and shorter line.

V.

The act of Congress approved July 12, 1876, and June 17, 1878 (see appendix), each prescribed reductions in the rates of pay to railroad companies for the transportation of the mails.

In administering the provisions of said acts of 1876 and 1878, and in making the reductions therein specified, the Postmaster General started with the maximum rates of pay allowed by the act of 1873 and the pro rata maxima prescribed by the regulations of the department for intermediate weights and reduced the rates in accordance with said acts. The maximum rates taken in connection with the averages, found as stated, and the mileage involved furnished the amount of the annual compensation.

VI.

In his report for the fiscal year ending June 30, 1884, the Postmaster General refers to the matter of "railroad rates," as embodied in the report of the Second Assistant Postmaster General, to which he called careful attention, and adds that "it is important that the rates paid should be arrived at by some equitable method." He says that in the 50 years intervening between 1834 and 1884 "legislation has touched this subject but four times"—in 1838, 1839, 1845, and 1873; that while the system of 1873 was an improvement on what went before, it was "still objectionable," "since it undertakes to pay for weight chiefly," and that the pay per ton per mile ranged from 8 to 96 cents. He recommended the passage of a proposed bill for the readjustment of compensation for the transportation of the mails on railroad routes as set forth therein.

Following this report said bill was introduced in the House, but no action was taken by the House on said bills H. R. 3057 and 6124, Forty-ninth Congress.

In September, 1884, the then Postmaster General prepared and issued an order in the form following:

"Order No. 44.—Hereafter when the weight of mails is taken on the railroad routes performing service seven days per week, the whole number of days the mails are weighed, whether thirty or thirty-five, shall be used as a divisor for obtaining the average weight per day."

Thereafter, October 22, 1884, the succeeding Postmaster General submitted the question to the Attorney General for his opinion as to whether the method adopted was a proper construction of the act of March 3, 1873, as follows:

24 "SIR: The act of March 3, 1873 (17 Stat. L., p. 558), regulating the pay for carrying the mails on railroad routes, provides:

"That the pay per mile per annum shall not exceed the following rates, namely:

"On routes carrying their whole length an average weight of mails per day of 200 pounds, \$50; 500 pounds, \$75; 1,000 pounds, \$100; 1,500 pounds, \$125; 2,000 pounds, \$150; 3,500 pounds, \$175, etc. * * *

"The average weight to be ascertained in every case by the actual weighing of the mails for such a number of successive working days, not less than 30 * * *."

"Upon a large number of the railroad routes mails are carried on six days each week; that is, no mail is carried on Sunday. On others they are carried on every day in the year.

"It has been the practice since 1873, in arriving at the average weight of mails per day on these classes of service, to treat 'successive working days' as being composed of six secular or working days in the week, which is explained by the following illustrations:

"Two routes, Nos. 1 and 2, over each of which 313 tons of mail are carried annually.

"On route No. 1 mails are carried twice daily, except Sunday, six days per week, and are weighed 30 successive working days, covering usually a period of 35 days. The result is divided by 30, and an average weight of mails per day of 2,000 is obtained.

Transportation per mile of road per annum	miles	1,252
Weight per mile of road per annum	tons	313
Pay per ton per mile of road per annum	cents	47.92
Pay per mile run of road per annum	do	11.09
Rate of pay allowed per mile per annum		\$150

"On route No. 2 mails are carried twice daily, seven days per week, and weighed for 30 successive working days and for the intervening Sundays, the weight on the Sundays being treated as if carried on Mondays, the weighing as before covering usually a period of 35 days. The result is divided by 30, and an average weight of mails per day of 2,000 pounds is obtained.

Transportation per mile of road per annum	miles	1,460
Weight per mile of road per annum	tons	313
Pay per ton per mile of road per annum	cents	47.92
Pay per mile run	do	10.02
Rate of pay allowed per mile per annum		\$150

"I have thought it necessary to give the foregoing illustrations in order that the practice of this department under the law cited may readily appear, and I will thank you to advise me whether that practice is in compliance with or in violation of the statute.

"If not in conformity with the law, will you please indicate the correct method by which the average weight per day should be obtained and the compensation adjusted thereon?

"Very respectfully,

"FRANK HATTON,

"Postmaster General.

"HON. B. H. BREWSTER,

"Attorney General,

"Department of Justice."

25 In reply, the Acting Attorney General gave his opinion as below:

"Department of Justice,

"Washington, October 31, 1884.

"The Postmaster General:

"SIR: I have considered your communication of the 22d instant requesting to know whether the construction placed by the Post Office Department on section 4002, subsection 2, prescribing the mode

in which the average of the weight of mails transported on railroad routes shall be ascertained is correct, and am of the opinion that that construction is correct, and that a departure from it would defeat the intention of the law and cause no little embarrassment.

"I have the honor to be, your obedient servant,

"WM. A. MAURY,
"Acting Attorney General."

This order No. 44 was thereafter, in January, 1885, revoked, and no weighings having occurred in the meantime, it never had any practical operation or result.

VII.

Complying with a resolution adopted by the Senate on January 19, 1885, the Postmaster General, on January 21, 1885, transmitted to the Senate a letter in which he gave "a documentary history of the Railway Mail Service from its origin in 1834 to the present time." Said communication contained the following statements, among others:

"Some little controversy at one time existed as to the justice of the present methods of obtaining the average daily weight to be taken as a basis for determining the annual pay, but a little examination made it clear that no other way of proceeding could be so just as that now in vogue.

* * * * *

"The present rule is, on those roads carrying the mails six times a week, to weigh the mails on thirty consecutive days on which the mails are carried, which would cover a period of thirty-five days; dividing the aggregate thirty weighings by thirty will give the daily average. On those roads carrying the mails seven times per week, the weighing is done for thirty-five consecutive days (including Sundays) and the aggregate divided by thirty for a basis of pay.

"It is evident that the period during which the weighing is continued covers, in both cases, all the mails carried for thirty-five days. If, in the second case, we should take our basis from an average obtained by dividing the aggregate weight by thirty-five we should commit the absurdity of putting a premium upon inefficiency, for evidently if the Sunday train were cut off we should virtually have the same mails less frequently carried, and therefore with a higher daily average, and therefore a higher pay basis than in the case where the seventh train was run and the greater accommodations rendered.

"The present method gives no additional pay for the additional seventh train, but the other method would cause a reduction on account of better service, and practically would operate as a fine on all those roads carrying the mails daily, and including Sunday." Senate Ex. Doc. 40, 48th Cong., 2d sess.

VIII.

The act of March 3, 1905, 33 Stat. L., 1088, changes the minimum weighing period provided by the act of 1873 so as to require the inclusion of at least 90 instead of at least 30 successive working days. (See Appendix.)

The Post Office appropriation bill for the fiscal year ending June 30, 1906, as reported to the House of Representatives by its Committee on Post Offices and Post Roads, contained the following:

"For inland transportation by railroad routes * * * \$40,900,000: Provided, That hereafter before making the readjustment of pay for the transportation of mails on railroad routes the Postmaster General shall have the mails on such routes weighed, and the average weight per day ascertained for a period of not less than three consecutive months."

Said proviso was stricken out in the House of Representatives and the following was adopted in lieu thereof and became a part of the act approved March 3, 1905:

"Provided, That hereafter before making the readjustment of pay for transportation of mails on railroad routes the average weight shall be ascertained by actual weighing of the mails for such a number of successive working days, not less than ninety, at such times after June thirtieth, nineteen hundred and five, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

In the administration of said act the Postmaster General made no change in the said system of weighing the mails theretofore adopted, except to weigh the mails for a period of 105 days instead of for a period of 35 days and to use as a divisor 90 instead of 30 to ascertain the average weight until the issuance of Order No. 412, set forth in Finding X.

IX.

At the second session of the Fifty-ninth Congress the Committee on Post Offices and Post Roads of the House of Representatives reported out a bill making appropriations for expenses of the Post Office Department for the fiscal year ending June 30, 1908, and the same became law on March 2, 1907. As reported out said bill contained the following provision:

"The Postmaster General is hereby authorized and directed to readjust the compensation to be paid from and after the 1st day of July, 1907, for the transportation of mails on railroad routes carrying their whole length an average weight of mails per day of upward of 5,000 pounds by making the following reductions from the present rates per mile per annum for the transportation of mails on such

routes: On routes carrying their whole length an average weight of mails per day of more than 5,000 pounds and less than 48,000 pounds, 5 per cent; 48,000 pounds and less than 80,000 pounds, 10 per cent; and \$19 additional for every additional 2,000 pounds: Provided, That hereafter the average weight per day be ascertained in every case by the actual weighing of the mails for such a number of successive days, not less than one hundred and five, at such times and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct: Provided further, That hereafter, at the time of the weighing of the mails at the periods required by law, empty mail bags shall not be weighed nor taken as any part of the total weight of the mails in estimating the pay for transportation of said mails."

Said bill was accompanied by a report of said committee which fully explained the construction and practice, under said previous acts of Congress, in the weighing of the mails, and that the purpose of said provision in the bill was to change the method of ascertaining the daily average weights by requiring that all of the days in the weighing period be included in the divisor. There was extensive debate in the Committee of the Whole House on the state of the Union on said provision, in which the chairman of said committee and other Members of the House stated and discussed the history, as hereinbefore narrated, of said existing practice of including the secular days only in the divisor of weights. Before action was had on said provision a motion was made to amend the bill by inserting the following proviso, referring to the sum appropriated for the Railway Mail Service:

"Provided, That no part of this sum shall be expended in payment for transportation of the mails by railroad routes where the average weight of mails per day has been computed by the use of a divisor less than the whole number of days such mails have been weighed."

A point of order was made against this amendment on the ground that it changed existing law, and the Chair sustained the point, observing:

"The existing law has received a construction by the officers charged with the duty of administering it, and that construction the Chair feels bound to follow. The proposed amendment changes existing law as construed by the proper officer by changing the divisor. * * * It has been held, further, that while limitation may provide that a part of an appropriation shall not be used except in a certain way, yet the restriction of executive discretion may not go to the extent of new duties. And the limitation on the discretion exercised under the law by a bureau of the Government is a change of existing law."

Upon appeal from the decision of the Chair, its ruling was sustained.

Another amendment was then offered, as follows:

"Provided further, That the words 'working days' shall be construed to mean days upon which work in the transportation of the mails by railroad routes where the average weight of mails per day has been computed by the use of a divisor less than the whole number of working days such mails have been weighed; and

"Provided further, That the words 'working days' shall be construed to mean days upon which work in the transportation of the mails by railroad routes is performed."

This amendment was also rejected after debate, and the provision reported by the Committee on Post Offices and Post Roads was then stricken out. Thereafter an amendment was offered as below by the chairman of said committee and was adopted by the House:

"The Postmaster General is hereby authorized and directed to readjust the compensation to be paid from and after the first day of July, nineteen hundred and seven, for the transportation of mail on railroad routes carrying their whole length an average weight of mail per day of upward of five thousand pounds by making the following changes in the present rates per mile per annum for the transportation of mail on such routes, and hereafter the rates on such routes shall be as follows: On routes carrying their whole length an average weight of mail per day of more than five thousand pounds and less than forty-eight thousand pounds the rate shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds, and on routes carrying their whole length an average weight of mail per day of more than forty-eight thousand pounds the rates shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds up to forty-eight thousand pounds, and for each additional two thousand pounds in excess of forty-eight thousand pounds at the rate of nineteen dollars and twenty-four cents upon all roads other than land-grant roads, and upon all land-grant roads the rate shall be seven-tenths of a dollar and ten cents for each two thousand pounds carried in excess of said forty-eight thousand pounds."

As so amended the bill was passed by the House and went to the Senate.

When said bill had gone from the House of Representatives to the Senate and had been reported by the Senate Committee on Post Offices and Post Roads an amendment was offered in the identical language of said amendment first rejected by the House. Said amendment was not debated nor explained, but was adopted by the Senate. The bill was then sent to a conference of the two Houses. In the conference objection was made on the part of the House of Representatives to said Senate amendment, and the committees of conference in their reports recommended that the Senate recede from the same, and the two Houses adopted said reports and passed the bill with said amendment stricken out but containing said provision which had been inserted by amendment in the House of Representatives.

When offering said amendment which was adopted in the House, the chairman of the House Committee on Post Offices and Post Roads pointed out that the pending bill had provided four distinct reductions (including the three carried in the provision hereinbefore set forth) in the compensation of railway mail carriers, and he explained that two of said four reductions, viz., that carried by the amendment he was offering, and one other, relative to pay for post-office cars, had been selected as those which the House apparently preferred to adopt.

X.

Thereafter the Postmaster General, on March 2, 1907, and June 7, 1907, respectively, issued orders as follows:

"Order No. 165.—That when the weight of mail is taken on railroad routes the whole number of days the mails are weighed shall be used as a divisor for obtaining the average weight per day.

29 "Order No. 412.—Ordered, that order 165, dated March 2, 1907, be, and the same is hereby, amended to read as follows.

"That when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day."

In accordance with the last-named order for all weighings and readjustments made subsequent to its promulgation, the Postmaster General weighed the mails on railroad routes for 105 days and divided the aggregate weights by 105, and the readjustments were made on the average weight per day so computed, and the plaintiff was paid accordingly.

Thereafter the Postmaster General submitted to the Attorney General the Order No. 412 for an opinion as to its legality, and the Attorney General, under date of September 27, 1907, rendered an opinion sustaining the legality of said order. (26 A. G. Op. 930.)

XI.

The quadrennial term for which readjustments had been made on the routes of the plaintiff, operated on June 30, 1908, as set forth in Finding I hereof, expired by limitation on that day. The Postmaster General, on January 31, 1908, notified the plaintiff of direction given to weigh the mails on route No. 120012. Accompanying said notice there were sent to the plaintiff a Post Office Department distance circular, known as Form 2504, which it was requested to fill out with certain specific information called for thereon and to return the completed circular to the Second Assistant Postmaster General. As transmitted to the plaintiff the form contained an agreement clause to be executed by a principal officer of the company, as follows:

"The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad mail service."

The notice from the Second Assistant Postmaster General accompanying said distance circular informed the plaintiff that the general superintendent had been directed to weigh the mails on its routes commencing February 11, 1908, "for the purpose of obtaining the data upon which the department may adjust the pay for mail service on the route (in accordance with the several acts of Congress governing the same), from July 1, 1908," etc. This notice contained the following:

"In connection with the readjustment to be made on this weighing of the mails, your attention is called to the Postmaster General's Order No. 412, of June 7, 1907, which reads as follows:

"That when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day."

Thereafter, on May 25, 1908, the plaintiff returned to the Second Assistant Postmaster General the executed distance circular with the reformation furnished and the agreement clause signed by an executive officer thereof.

Like notices and distance circulars bearing the same date for the other routes set forth in Finding I hereof for the term July 1, 1908, to June 30, 1912, and for route 114025 for the term beginning July 1, 1909, were sent the plaintiff by the Postmaster General, and said distance circulars were returned executed by the plaintiff, as in the case for route No. 120012.

The Postmaster General caused the mails to be weighed on each of said routes for 105 days, then caused the average daily weight carried thereon to be computed, as provided in said order No. 412, and on the basis of the weight so ascertained caused the maximum statutory rate to be calculated; and on September 12, 1908, he issued orders stating such amounts and rates as the compensation for the service. The order for route 120012 was as follows:

"Route No. 120012—S. C. Hamlet, N. C.—Jacksonville, Fla., Seaboard Air Line Railway, 384.91 miles, 14.66 t. a. w., 12,599 lbs.

"From July 1, 1908, to June 30, 1912, pay the Seaboard Air Line Railway quarterly, for the transportation of the mails between Hamlet, N. C., and Jacksonville, Fla., at the rate of \$95,207.48 per annum, being \$247.35 per mile for 384.91 miles, and for R. P. O. car service at the rate of \$9,620.00 per annum, being \$25.00 per mile for 384.80 miles for one line of 40-foot cars, Hamlet, N. C., to Jacksonville, Fla.

"This adjustment is subject to future orders and to fines and deductions and is based on a service of not less than six round trips per week."

The Second Assistant Postmaster General, on September 8, 1908, sent to the plaintiff a notice of such readjustment of pay, as follows:

"SIR: The compensation for the transportation of mails, etc., on route No. 120012, between Hamlet, N. C., and Jacksonville, Fla., has been fixed from July 1, 1908, to June 30, 1912 (unless otherwise

ordered), under acts of March 3, 1873; July 12, 1876; June 17, 1878; March 3, 1905; and March 2, 1907, upon returns showing the amount and character of the service for a number of successive working days, not less than 90, commencing February 11, 1908, at a rate of \$95,207.48 per annum, being \$247.35 per mile for 384.91 miles, and pay is allowed for use of R. P. O. cars from July 1, 1908, to June 30, 1912, at the rate of \$9,620 per annum, being \$25 per mile for 384.80 miles, Hamlet, N. C., and Jacksonville, Fla., for one line of 40-foot cars.

"This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week."

Similar orders were issued and notices thereof sent to the plaintiff following the readjustments made on its other routes, where the term of its service began July 1, 1908.

In its said calculations the Post Office Department began by applying the same rates that were named in said act of March 3, 1873, and then made those deductions which were prescribed respectively by said acts of July 12, 1876, June 17, 1878, and March 2, 1907.

For the routes upon which adjustments were made for the term beginning July 1, 1912, the same notices of purpose to weigh and the same forms of distance circulars were sent to the plaintiff. The plaintiff returned to the Second Assistant Postmaster General the executed distance circulars containing an agreement clause substituted

for the one printed thereon, executed by its vice president.
31 This agreement clause, as modified by plaintiff and executed by it, read as follows:

"The company named below agrees to accept and perform mail service upon the conditions prescribed by valid and existing laws, and valid regulations of the Post Office Department applicable to railroad mail service made in conformity therewith."

The Second Assistant Postmaster General addressed a letter to plaintiff on June 20, 1912, replying to said statements in agreement clause as follows:

"It is noted your company has affixed to the circular, so as to obliterate this clause, a typewritten form of agreement and acceptance in the following words:

"The company named below agrees to accept and perform mail service upon the conditions prescribed by valid and existing laws, and valid regulations of the Post Office Department applicable to railroad mail service made in conformity therewith."

"In regard to the statements contained in the typewritten form of agreement and acceptance substituted by your company for the agreement clause of the circular, and in reply thereto, I have to inform you that, notwithstanding the same, the Post Office Department will not enter into contract with any railroad company by which it may be excepted from the operation or effect of any postal law, regulation, or order of the Postmaster General; and it must be understood that, in the performance of service, from the beginning

of the contract term above named and during the continuance of such performance of service, your company will be subject, as in the past, to all the postal laws, regulations, and orders of the Postmaster General which are now or may become applicable during the term of this service, and to usual customs and practices in relation to railroad mail service; and that no other or further compensation for such service performed will be paid than that fixed by the orders of the Postmaster General."

Thereafter the Postmaster General caused the mails to be weighed, the average daily weights carried thereon to be computed, and ascertained the compensation in the manner hereinbefore stated for the preceding term, and on September 19, 1912, issued orders stating the amount and rates of such compensation accordingly and notified the plaintiff the same as for the readjustment for the preceding term.

The Second Assistant Postmaster General addressed a letter to the plaintiff on June 30, 1913, as follows:

"SIR: At the time the notice of direction given to weigh the mail on your company's route No. 120012, from Hamlet, N. C., to Jacksonville, Fla., for the purpose of adjusting pay thereon was communicated to your company, you were informed of the intention of the department to apply Postmaster General's Order No. 412 in making such adjustment. In this connection you are informed that the compensation for carrying mails heretofore fixed, or which may be hereafter fixed by the orders of the Postmaster General on the abovenamed route, in which adjustment the said Order No. 412 has been or will be followed, is all that will be paid for the service on the route. Continuance of service by your company must only be with the understanding that such compensation as may be or which has been obtained by applying Order No. 412 shall be full payment for all services rendered by you."

32

XII.

The claimant continued to carry the mails of the United States from and after the 1st day of July, 1908, 1909, and 1912 on its respective routes which it was operating on those dates, as hereinbefore set forth, and has been paid for the service at the rates of compensation stated by such orders. The payments were made monthly and received by the plaintiff without objection or protest on its part, and no demand for further compensation was made until the commencement of this suit.

XIII.

The act making appropriations for the service of the Post Office Department for the fiscal year ended June 30, 1909, as reported to the House by the committee, contained no reference to the matter of weighings of the mails or to the question of the divisor. While in the Committee of the Whole an amendment was offered providing in effect that not exceeding six-sevenths of the amount payable under

the orders adjusting pay in the two contract sections to which Order 412 had not been applied should be paid out of the appropriation thereby made until such adjustment should have been made in accordance with Order 412, or until it should have been finally determined by law that the first or then existing adjustment was binding upon the Government, notwithstanding any error or wrong in the basis of such ascertainment. A point of order was raised on this in the House, and the Chairman of the Committee of the Whole overruled it, and the amendment was agreed to. The bill with the amendment was passed by the House and sent to the Senate. It was reported from the Senate Committee on Post Offices and Post Roads to the Senate with a substitute amendment for the one passed by the House, which substitute amendment, among other things, provided that the whole number of days included in the weighing period shall be used as a divisor for obtaining the average daily weight. A point of order was raised on this in the Senate, and the President of the Senate overruled it, and then the amendment was agreed to. The bill with the amendment was passed by the Senate.

A slight change was made by the conferees of the Senate and the House, and their agreement was reported to their respective bodies. The House, however, refused to adopt the Senate amendment and the Senate receded, and the provision failed of enactment. In the discussion of the bill in the Senate the active member of the committee explaining the bill stated that the provision was intended to crystallize into law the requirement that seven days instead of six shall be used as the divisor in determining the amount due the railroad companies, and the chairman of the committee in the House declared that the provision "makes permanent law what is now known as the divisor. It is now but a department official order, subject to change or repeal by any subsequent official in control of the department. By making it permanent law we avoid that possibility."

In the annual reports for the fiscal year 1907 and following years the Post Office Department stated its estimates of expenses for transportation by railroad routes, which estimates were calculated upon the application of the new divisor in so far as the same had been applied from year to year. These reports reached Congress through the usual channels of transmission. The report for 1907 stated that the railroad companies were dissatisfied with the order and had modified their distance circulars by excepting to it. Notwithstanding such protests, Congress made the appropriations as submitted by the department. The reports for 1910 and succeeding years further stated that the railroad companies protested against the use of the new divisor, and that suits had been filed calling into question its validity. In submitting its estimates for appropriations for the years mentioned the department prepared them upon the basis of the application of Order 412 in so far as it had been applied from year to year, and Congress made appropriations based thereon.

XIV.

If instead of using a divisor of 105, there had been used a divisor of 90, and to the average weights thus found the maximum rates allowed by law be applied, the difference between the amount so resulting and what was paid plaintiff is \$223,132.04.

XV.

The plaintiff has received monthly or quarterly payments, based upon said computation and readjustments, at or about the end of each month or quarter's service, and the payments were received without objection or protest of any kind.

XVI.

Reference is made to the several reports of the Postmasters General for the years 1867 to 1914, inclusive; to Preliminary Report and Hearings relative to Railway Mail Pay before Joint Committee of Congress, January, 1913, to April, 1914, pages 1023, 1024; also to the acts of Congress appearing in the appendix to these findings.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that plaintiff is not entitled to recover, and its petition is accordingly dismissed. (See Opinion and Concurring Opinions filed herewith in cases Nos. 32812, 31304, and 31227.)

34

Appendix.

Act of 1873.

The act of March 3, 1873, 17 Stat. L., 558, appropriates for the service of the Post Office Department "out of any moneys in the Treasury arising from the revenues of said department, in conformity to the act of July second, eighteen hundred and thirty-six" (5 Stats., 80), "For inland mail transportation, fourteen million eight hundred and forty thousand and twenty dollars," and makes appropriations for messengers, route agents, mail-route messengers, local agents, letter carriers, etc., and then follows:

"For increase of compensation for the transportation of mails on railroad routes upon the condition and at the rates hereinafter mentioned, five hundred thousand dollars, or so much thereof as may be necessary: Provided, That the Postmaster General be, and he is hereby, authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned, to wit, that the mails shall be conveyed with due frequency and speed; that sufficient and suitable room, fixtures, and furniture, in a car or apartment properly lighted and warmed, shall be provided for route

agents to accompany and distribute the mails; and that the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars; five hundred pounds, seventy-five dollars; one thousand pounds, one hundred dollars; one thousand five hundred pounds, one hundred and twenty-five dollars; two thousand pounds, one hundred and fifty dollars; three thousand five hundred pounds, one hundred and seventy-five dollars; five thousand pounds, two hundred dollars, and twenty-five dollars additional for every additional two thousand pounds, the average weight to be ascertained in every case by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times, after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct: Provided also, That in case any railroad company now furnishing railway post-office cars shall refuse to provide such cars, such company shall not be entitled to any increase of compensation under any provision of this act: Provided further, That additional pay may be allowed for every line comprising a daily trip each way of railway post-office cars, at a rate not exceeding twenty-five dollars per mile per annum for cars forty feet in length; and thirty dollars per mile per annum for forty-five feet cars; and forty dollars per mile per annum for fifty feet cars; and fifty dollars per mile per annum for fifty-five feet to sixty feet cars:

35 And provided also, That the length of cars required for such post-office railway-car service shall be determined by the Post Office Department, and all such cars shall be properly fitted up, furnished, warmed, and lighted for the accommodation of clerks to accompany and distribute the mails: And provided further, That so much of section two hundred and sixty-five of the act approved June eighth, eighteen hundred and seventy-two, entitled 'An act to revise, consolidate, and amend the statutes relating to the Post Office Department,' as provides that 'the Postmaster General may allow any railroad company with whom he may contract for the carrying of the United States mail, and who furnish railway post-office cars for the transportation of the mail, such additional compensation beyond that now allowed by law as he may think fit, not exceeding, however, fifty per centum of the said rates,' be, and the same is hereby, repealed."

Act of 1875.

The act of March 3, 1875, 18 Stat. L., 341, appropriates \$17,548,000 for inland mail transportation.

"And out of the appropriation for inland mail transportation the Postmaster General is authorized hereafter to pay the expenses of taking the weights of mails on railroad routes, as provided by the act entitled 'An act making appropriations for the service of the Post Office Department for the year ending June thirtieth, eighteen hundred and seventy-four,' approved March third, eighteen hundred

and seventy-three; and he is hereby directed to have the mails weighed as often as now provided by law by the employees of the Post Office Department, and have the weights stated and verified to him by said employees under such instructions as he may consider just to the Post Office Department and the railroad companies."

Act of 1876.

The act of July 12, 1876, 19 Stats., 79, appropriates for inland mail transportation, separating other than railroad routes from the latter, and—

"For transportation by railroad one million one hundred thousand dollars: Provided, That the Postmaster General be, and he is hereby, authorized and directed to readjust the compensation to be paid from and after the first day of July, eighteen hundred and seventy-six, for transportation of mails on railroad routes by reducing the compensation to all railroad companies for the transportation of mails ten per centum per annum from the rates fixed and allowed by the first section of an act entitled 'An act making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, eighteen hundred and seventy-four, and for other purposes,' approved March third, eighteen hundred and seventy-three, for the transportation of mails on the basis of the average weight. And the President of the United States is hereby authorized to appoint a commission of three skilled and competent persons, who shall examine into the subject of transportation of the mails by railroad companies, and report to Congress at the commencement of its next session such rules and regulations for such transportation and rates of compensation therefor as shall in their opinion be just and expedient, and enable the department to fulfill the required
36 and necessary service for the public. And to defray the expense of said commission the sum of ten thousand dollars is hereby appropriated out of any money in the Treasury not otherwise appropriated."

Act of 1877.

By the act approved March 3, 1877, 19 Stats., 385, this commission was continued.

Act of 1878.

The act of June 17, 1878, 20 Stats., 142, appropriates—

"For transportation by railroad, nine million one hundred thousand dollars; * * * And provided further, That the Postmaster General be, and he is hereby, authorized and directed to readjust the compensation to be paid from and after the first day of July, eighteen hundred and seventy-eight, for transportation of mails on railroad routes by reducing the compensation to all railroad companies for the transportation of mails five per centum per annum from the rates for the transportation of mails, on the basis of the

average weight fixed and allowed by the first section of an act entitled 'An act making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, eighteen hundred and seventy-seven, and for other purposes,' approved July twelfth, eighteen hundred and seventy-six."

Act of 1905.

The act of March 3, 1905, 33 Stats., 1088, appropriates for inland transportation by railroad routes \$40,900,000, of which \$120,000 may be employed for other purposes mentioned—

"Provided, That hereafter before making the readjustment of pay for transportation of mails on railroad routes, the average weight shall be ascertained by the actual weighing of the mails for such a number of successive working days not less than ninety, at such times after June thirtieth, nineteen hundred and five, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

Act of 1906.

The act of Congress approved June 26, 1906, 34 Stats., 467, 472, 473, appropriated \$43,000,000 for inland transportation by railroad routes for the fiscal year ending June 30, 1907, and provided:

"That the Postmaster General shall require all railroads carrying the mails under contract to comply with the terms of said contract as to time of arrival and departure of said mails, and it shall be his duty to impose and collect reasonable fines for delay, when such delay is not caused by unavoidable accidents or conditions."

Act of 1907.

The act of March 2, 1907, 34 Stats., 1212, appropriates—

"For inland transportation by railroad routes, forty-four million six hundred and sixty thousand dollars.

37 "The Postmaster General is hereby authorized and directed to readjust the compensation to be paid from and after the first day of July, nineteen hundred and seven, for the transportation of mail on railroad routes carrying their whole length an average weight of mails per day of upward of five thousand pounds by making the following changes in the present rates per mile per annum for the transportation of mail on such routes, and hereafter the rates on such routes shall be as follows: On routes carrying their whole length an average weight of mail per day of more than five thousand pounds and less than forty-eight thousand pounds the rate shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds; and on routes carrying their whole length an average weight of mail per day of more than forty-eight thousand pounds the rate shall be five per centum less than the present rate on all weight carried in excess of five thousand

pounds up to forty-eight thousand pounds, and for each additional two thousand pounds in excess of forty-eight thousand pounds at the rate of nineteen dollars and twenty-four cents upon all roads other than land-grant roads, and upon all land-grant roads the rate shall be seventeen dollars and ten cents for each two thousand pounds carried in excess of said forty-eight thousand pounds."

38 V. *Opinion of the Court by Campbell, Ch. J., and Concurring Opinions by Booth, J., Barney, J., Downey, J., and Hay, J.*

Filed March 11, 1918.

(Decided March 11, 1918.)

Nos. 31227, 31304, 32812, 32852.

KANSAS CITY, MEXICO AND ORIENT RAILWAY COMPANY OF TEXAS

v.

THE UNITED STATES.

THE NORTHERN PACIFIC RAILWAY COMPANY

v.

THE UNITED STATES.

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY

v.

THE UNITED STATES.

THE SEABOARD AIR LINE RAILWAY COMPANY

v.

THE UNITED STATES.

Divisor Cases.

Opinion.

CAMPBELL, Chief Justice, delivered the opinion of the court:

These suits were brought to recover compensation for mail transportation alleged to be due the parties respectively, and have been heard together. A large number of similar cases were taken upon submission when these were heard. The questions involved are substantially the same as those in Chicago & Alton R. R. Co., 49 C. Cls., 463, and Yazoo & Mississippi Valley R. R. Co., 50 C. Cls., 15. The two latter cases were appealed to the Supreme Court, where

they were affirmed by an equally divided court. That ruling is not an authority for the determination of other cases. *Hertz v. Woodman*, 218 U. S., 205. It does not follow, however, that the decisions of this court must be ignored by the court itself when similar cases are again presented. The court should have some regard for its own decisions, and in class cases where though the plaintiffs can not appeal or where the defendants do not appeal the court adheres to its ruling and refuses to reconsider cases subsequently presented that are governed by the former decisions. These considerations could very well justify the court's disposition of the instant cases without an opinion. The plaintiffs, however, are entitled to findings of fact because the amounts claimed are sufficient to authorize appeals. It was therefore decided to hear the parties again in argument, and certain typical cases have been prepared with the view to presenting all of the questions that it is supposed can arise in these so-called divisor cases. The plaintiffs' attorneys have accordingly been heard in extended oral argument and they have filed able and extensive briefs. They have probably left nothing unsaid that would tend either to elucidate the questions involved or to show the right of plaintiffs to recover.

39 As we adhere to the conclusion that the petitions should be dismissed, we will deal more at length with the cases than would be done by the mere announcement of a conclusion of law. There are some differences in the cases, but we think they can all be disposed of in one opinion.

These suits were brought in the years 1911, 1912, 1913, and 1914, respectively. In some of them objection was made to Order 412 hereafter mentioned; in some of them no objection to the order was made. To each of the objections reply was made by the Postmaster General to the effect that no contract would be made which excluded a full observance of the rules and regulations, and at that time Order 412 had been promulgated. The respective adjustment notices which later followed had not been issued; all of the plaintiffs received and transported the mails and were paid therefor periodically according to the terms of Order 412 and the readjustment notices issued by the Postmaster General and without objection or protest when payments were accepted.

The objections or exceptions to Order 412 were general. There was no separate objection based upon a supposed injustice to 6-day routes. The contracts were with the different plaintiffs who operated both classes of routes and contracted for both alike.

The claims may be classified as being (1) claims of what are called 6-day routes, (2) claims of 7-day routes, (3) claims of a railroad on parts of whose line are routes affected by the land-grant act.

An illustration of the claims asserted by some 7-day routes under a supposed implied contract may be taken from a typical route as follows: The mails were actually weighed on the route for 105 days, which included 15 Sundays. The total of the 105 weighings (making the dividend) was divided by 105, and the daily average weight was found to be 143,314 pounds. The maximum statutory rates were applied, and the annual compensation was ascertained to be \$305,-

253.67. This sum was paid in monthly installments, which, as they severally matured, were received by the carrier without objection of any kind.

If instead of using 105 as the divisor 90 had been used, the daily average weight would have been 167,199 instead of 143,314 as actually found.

Assuming that the actual average weight found by 105 as the divisor fairly represented the actual weight carried each day throughout the year, it would appear that on said route there was actually transported during the year of 365 days something over fifty-two million (52,000,000) pounds of mail, whereas if 90 had been used as the divisor the carrier would have been credited with transporting during the year about sixty-one million pounds, making a difference between what was thus actually carried and what by the use of the divisor 90 would appear to have been carried of about nine million pounds of mail. If the basis adopted was 313 days per year the difference in the weights under like computations would be approximately seven and a half million pounds. The difference between what the carrier was paid and what it would have received if its

40 compensation had been based upon the result of using 90 as the divisor and the maximum rate would have been about \$46,000 per year. This amount for each of the years in suit is claimed. The actual weight of the mails carried during the year is not shown except by taking the actual average weight per day found as above and multiplying it by 313 or 365 days. The actual weight can not be approximated otherwise.

The action is based upon contract, and plaintiff, denying there was an express contract, relies upon implied contract for recovery as upon quantum meruit. It has been paid the maximum rates provided by law for the average weight of mails actually carried. Can it recover under an implied contract as upon quantum meruit for the nine million pounds of mail which it did not in fact carry and thereby receive \$46,000 per year additional to what it has received?

A contention advanced, however, by plaintiffs is that the law required the use of a "divisor of 90."

Two propositions may be regarded as settled:

(1) That the railroad companies were until the act of July, 1916, free to accept or refuse the terms proposed by the Postmaster General for the transportation of mails. Thus it was held in Alabama Great Southern Railroad case, 25 C. Cls., 30, 41, decided in 1889, in an opinion by Judge Nott, that railroads other than land-grant roads "are under no obligation to the Government to carry the mail and may decline the service if they will, but that if they do perform, it must be upon the terms and conditions prescribed by the statutes and regulations of the Post Office Department or under an express contract within the limitations imposed by law." This case was affirmed by the Supreme Court, 142 U. S., 615.

In Eastern Railroad Company, 129 U. S., 391, 395, it is said:

"After the first of July, 1877, the company was under no legal

obligation to carry the mails. * * * We do not mean that the railroad company was bound to continue the carrying of the mails, if subsequent changes in the rates were unreasonable or did not meet with its assent. On the contrary, it was at liberty, when the five per cent reduction was made, to discontinue their transportation on its cars."

In *Chicago, Milwaukee & St. Paul Railway Company*, 198 U. S., 385, 389, it is said:

"A contract may not be forced upon a railway. It may accept, however, and become bound by the action of the Post Office Department."

To the same effect is *Minneapolis & St. Louis Railway Company*, 24 C. Cls., 350, and *Texas & Pacific Railway Company*, 28 C. Cls., 379.

In *L. & N. Railroad Company*, 46 C. Cls., 267, 277, it was declared that the Post Office Department had no authority to compel the company to transport the mail upon terms to which it had not agreed. *Delaware, L. & W. Case*, 51 C. Cls., 426.

(2) The rates stated in the statutes were maximum rates.

After the amendatory acts of 1876 and 1878 herein mentioned were passed a suit was brought in this court involving the construction of said acts, and in the opinion delivered by Judge Richardson (*Eastern Railroad Company Case*, 20 C. Cls., 23, 41) it was said:

"Section 4002 of the Revised Statutes, from the act of 1873, does not establish an absolute rate of compensation, necessarily
41 alike to all railroads, for mail transportation, but fixes maximums which are not to be exceeded, leaving the Postmaster General a discretion to make contracts at less rates if he should be able to do so. On that point the language of the section is clear—'the pay per mile shall not exceed the following rates.' It is urged that this language is controlled by the preceding words of the section, 'The Postmaster General is authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned.' In our opinion the rates there referred to are any rates which the Postmaster General may contract for, not exceeding those thereafter mentioned."

This case was decided January 12, 1885, and upon appeal was affirmed by the Supreme Court February 4, 1889, 129 U. S. 391, 395. In the Supreme Court's opinion, delivered by Mr. Justice Harlan, it is said:

"After the first of July, 1877, the company was under no legal obligation to carry the mails. It carried them after that date under an implied contract that it should receive such compensation as was reasonable, not exceeding the maximum rates prescribed by Congress and subject to a readjustment of rates as required by the act of 1876."

Again, in 1889, this court, speaking through Chief Justice Richardson, in *Minn. & St. L. Ry. Co. Case*, 24 C. Cls., 350, said (p. 361):

"In the Eastern Railroad Case (20 C. Cls., R. 41), affirmed on appeal (129 U. S., 391), we held that the statute (Rev. Stat., §4002) did not fix the exact amount to be allowed to railroads, but only the maximum which the Postmaster General could not exceed, leaving to him a discretion to make contracts in his own way at less rates if he should be able to do so."

And again, in 1893, in the Texas & Pac. Ry. Co. Case, 28 C. Cls., 379, it was said (p. 389):

"It seems to be assumed by the claimant that the statutes fix an absolute rate of compensation, while in point of fact they fix only the maximum below which the Postmaster General is authorized to make such contracts as he deems the needs of the mail service may justify."

In A. G. S. R. R. Co. case, 25 C. Cls., 30, 43, decided in 1889, this court, speaking through Judge Nott, and with reference to the portions of a railroad that were land-aided, said:

"But as to these latter portions of the road it was unquestionably within the power of Congress to set a limitation upon the price which should be paid for such service, and thereby to leave the public agent, the Postmaster General, without authority to bind the defendants for any greater price, either by entering into an express contract or by accepting the claimant's services without one; and it was equally within the discretion of Congress to fix different rates for different roads or classes of roads, and in so doing to say that if part of a mail carrier's line was a land-grant road the remainder of the line should be restricted to the same compensation. Such a restriction would not bind the carrier to carry the mail, but it would bind the Postmaster General not to incur a greater liability, and would be notice to the road at what point his authority to bind the Government by contract terminated."

42 In Jacksonville, Pensacola & Mobile R. R. Co. case, 21 C. Cls., 155, decided in 1886, and affirmed by the Supreme Court (118 U. S., 626), it is recognized that the rates mentioned in the statute are maximum rates.

In A. T. & S. F. Ry. Co. case, 225 U. S., 640, the court construed a provision of the act of March 2, 1907, 34 Stats., 1212, which provides additional pay for railway post-office cars "at a rate not exceeding" designated sums for different lengths of cars. That act was an amendment of section 4004 Revised Statutes in that it changed the maximum rate stated and made some change with reference to the sizes of the cars mentioned in the earlier act. The terms "at a rate not exceeding" are the same in both acts, and section 4004 is in the same language as the second proviso in the act of 1873. The Supreme Court held "The statute defined a car line, but did not fix the compensation. It left that to be determined by the Postmaster General, who could have named any rate not to exceed the statutory maximum." If the language of said proviso to the act of 1873 only fixed a maximum rate, it is difficult to see how the language in the same statute that the pay per mile per annum "shall not exceed the following rates" is to be given a different meaning.

That the rates were "specified maximum rates" was recognized by

the Supreme Court as early as 1881 in *Chicago & N. W. Ry. Co.*, 104 U. S., 680, 683. That they were maximum rates is declared by Revised Statutes, section 3999, providing for the contingency that the Postmaster General may not be able to contract within the prescribed maximum rates.

We think it is too late to question the rule stated.

First: It is said in one of the briefs for plaintiffs, speaking of the act of March 3, 1873, 17 Stats., 558, that it "plays the most important part in this case." But that act is not to be considered independently of the balance of the law when we come to construe its meaning.

The act of June 8, 1872, 17 Stats., 283, entitled "An Act to revise, consolidate, and amend the Statutes relating to the Post Office Department," deals comprehensively, as its title imports, with the powers, duties, and responsibilities of that department. It was referred to in the opinion of this court in the *Chicago & Alton* case and we now mention some of its provisions with more particularity. It contains more than 300 sections and embodies the statutory law relating to the Post Office Department, with perhaps a minor exception not material here. By its repealing clause (sec. 327) it repeals "the following acts and parts of acts and resolutions and parts of resolutions," and there follows a list of the acts and resolutions wholly or partly repealed, beginning with section 2 of the act of March 3, 1791, and concluding with the act of April 27, 1872. Included in the repealed statutes are the act of July 2, 1836, 5 Stat., 800, the two acts of March 3, 1845, 5 Stats., 732, 748, and section 8 of the act of March 3, 1845, 5 Stats., 752. It provides for the establishment of "a department to be known as the Post Office Department," the principal officers of which "shall be one Postmaster General and three Assistant Postmasters General," to be appointed by the President, by and with the consent of the Senate. The term of office of the Postmaster General is "for and during the term of

43 the President by whom he is appointed, and for one month thereafter, unless sooner removed."

After prescribing in particular some of the duties of the Postmaster General, the act of 1872 provides (sec. 6) that he shall generally superintend the business of the department and execute all laws relating to the postal service.

By section 388 of the Revised Statutes of 1873 it is provided "That there shall be at the seat of government an executive department to be known as the Post Office Department, and a Postmaster General, who shall be the head thereof."

Among other provisions of the act of 1872 the following appear:

Section 46: "That the money required for the postal service in each year shall be appropriated by law out of the revenues of the service."

Section 210: "That the Postmaster General shall arrange the railway routes on which the mail is carried" * * * "into three classes, according to the size of the mails, the speed at which they are carried, and the frequency and importance of the service, so that each railway company shall receive, as far as practicable, a proportionate

and just rate of compensation, according to the service performed." This differs from its predecessor, the act of 1845, in the order of terms and in the introduction of the word "frequency," which did not appear in the act of 1845.

Section 211 provides the maximum pay for the several classes of routes "per mile per annum."

Section 212: "That if the Postmaster General is unable to contract for carrying the mail on any railway route at a compensation not exceeding the maximum rates herein provided, or for what he may deem a reasonable and fair compensation," he may make other arrangements for carrying the mails.

Section 213: "That every railway company carrying the mail shall carry on any train which may run over its road, and without extra charge therefor, all mailable matter directed to be carried thereon, with the person in charge of the same."

Section 214 provides that all railway companies which have been aided by a grant of land or otherwise "shall carry the mail at such prices as Congress may by law provide; and, until such price is fixed by law, the Postmaster General may fix the rate of compensation."

Section 256: "That no contract for carrying the mail shall be made for a longer term than four years, and no contract for carrying the mail on the sea shall be made for a longer term than two years."

Section 265 authorizes the Postmaster General to enter into contracts for carrying the mails with railway companies without advertising for bids therefor, and further authorizes him to allow any railway company "with whom he may contract for the carrying of the United States mail, and who furnish railway post-office cars for the transportation of the mail, such additional compensation beyond that now allowed by law as he may think fit, not exceeding, however, fifty per centum of the said rates."

Section 200: "That all the waters of the United States shall be post roads during the time the mail is carried thereon."

Section 201 provides "That all railways and parts of railways which are now or hereafter may be put in operation are hereby declared to be post roads"; and by sections 202 and 203 canals

44 and plank roads during the time the mail is carried thereon are declared to be post roads.

All of these sections were carried into the revision of 1873 and constitute sections 3997 et seq. and section 3934 and sections 3942 and 3956 of the Revised Statutes, the latter authorizing contracts with railway companies without advertising for bids and declaring that no contract for carrying the mails shall be made for a longer term than four years.

Provision is made (sec. 212, act of 1872; sec. 3999, Rev. Stats.) for the contingency that the Postmaster General may be unable to contract for the carrying of the mail on any railway route at a compensation "not exceeding the maximum rates herein provided, or for what he may deem a reasonable and fair compensation," and he is authorized to contract with others for the service upon the happening of such a contingency. It is manifest that this section, being an authority to a public officer to contract with the railway companies within the maximum rates fixed by the act, "or for what he

may deem a fair and reasonable compensation," was something more than a mere authority conferred on him, because the words just quoted are sufficient, when addressed to a public officer, to impose upon him the duty of exercising his judgment as to the reasonableness and fairness of the compensation which he proposes to pay.

It is not necessary when inquiring into the powers and functions of the Postmaster General under such an act as that of 1872 or the revision of 1873 to find expression in explicit terms of all his rights and powers and duties. An applicable rule in such case, stated in one of the plaintiff's briefs and in the Government's brief as well, is as follows:

"A practical knowledge of the action of any one of the great departments of the government, must convince every person that the head of a department in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done, that can neither be anticipated nor defined and which are essential to the proper action of the government. Hence, of necessity, usages have been established in every department of the government which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usages can have a retrospective effect, but must be limited to the future." *United States v. Macdaniel*, 7 Pet., 1, 14.

Aside from that rule it is plainly deducible from the terms of the statute that there was devolved upon the Postmaster General the duty of contracting with railway companies on terms within maximum rates and that it required of him the exercise of a broad discretion in matters pertaining to the transportation of the mails. In 45 theory at least the expenses of handling the mails by the department were to be borne by its revenues. *Rev. Stat., sec. 4054.* These were to be covered into the Treasury and the expenses were appropriated for by Congress out of such revenues. From the earliest period the carrying of the mails was under contract, and the act of 1872 made no change in that regard except in the case of land-aided roads. Their duty to transport the mails arose from the statutes granting them aid.

When therefore we come to consider the meaning of the act of March 3, 1873, we must treat it not as a separate and distinct piece of legislation, but in connection with the law then upon the statute book, of which, when enacted, it became only a part. By its enactment some material changes in the existing law were made, and those are to be ascertained from a proper consideration of the entire law. Repeals by implication are never favored. Where there is inconsistency between the provisions of the new law and those of the old effect should be given to both if it reasonably may be, and unless

there be a positive repugnancy the old law is only repealed by implication pro tanto to the extent of the repugnancy. Wood's case, 16 Pet., 342, 363; Tynen's case, 11 Wall., 88, 93.

Some significance attaches to the fact that the Congress enacted in the revisions of 1873 so many of the provisions of the act of 1872 and incorporated therein at the same time the act of 1873, and to the further fact that those provisions have continued as part of the law. The act of July, 1916, 39 Stats., 425, marked a distinct departure from prior law.

As already stated the revision of 1873 made the Postmaster General "the head of an executive department," thereby enlarging the first section of the act of 1872. It also by section 4003 made an important change in the proviso from which that section is taken in the act of 1873. The latter act provided that "in case any railway company, now furnishing railway post-office cars shall refuse to provide such cars such company shall not be entitled to any increase of compensation under any provision of this act," while section 4003 forbids any increase of compensation under the provisions of "the next section," which provides an increase for the use of the cars. These provisions are in the law because of the adoption of the revision of 1873.

The authority and duty of the Postmaster General to make contracts with railway companies, the provision that no contract for carrying the mails "shall be made for a longer term than four years," the right of the Postmaster General to discontinue service on any postal route, the classification of railway routes and the maximum pay therefor, the duty of the Postmaster General to make contracts with others where he can not contract within the maximum rates provided by the statute or "for what he may deem a reasonable and fair compensation," and other provisions of the act of 1872, have been continued as a part of the statutory law along with the act of 1873.

The act of 1845 had directed that the Postmaster General arrange and divide the railroad routes into three classes according to the size of the mails, the speed with which they were to be conveyed, and the importance of the service, while section 210 of the act of 1872 (sec. 3997 Rev. Stats.) provided for arranging the railway routes into three classes according to the size of the mails, the speed at which they are carried, and the "frequency and importance of the service," so that all railway companies shall receive, as far as practicable, a proportionate and just rate of compensation, according to the service performed. The "equal and just" rate of compensation mentioned in the act of 1845 gives way to just and proportionate rate in the act of 1872.

The act of 1873 appropriates for an increase of compensation, and provides that the Postmaster General readjust the compensation to be paid for the transportation of the mails on railroad routes "upon the conditions and at the rates hereinafter mentioned," said conditions being, first, that the mails shall be carried with due frequency and speed and that a suitable car be provided, and, second, "that the pay per mile per annum shall not exceed the following rates." (Sec. 4002, Rev. Stats.).

Due frequency and speed and the furnishing of certain cars were

conditions, and what should be due frequency and speed, and what the character of the cars, were left largely in the first instance to the determination of the Postmaster General, but being "conditions" it is clearly implied that the matter should be consummated by an agreement of the parties.

Whether in putting in operation the act of 1873 the Postmaster General could have continued to classify the routes into three classes as provided by section 3997 of the Revised Statutes we need not stop to inquire. The authority to do so having been continued, it can not be positively affirmed that the act of 1873 prevents it. It certainly can not be affirmed that the act of 1873 is inconsistent with all of the provisions of section 210 of the act of 1872 (sec. 3997, Rev. Stats.), which, as stated, still stands upon the statute book as declaring the purpose that some distinctions be made "so that each railway company shall receive, as far as practicable, a proportionate and just rate of compensation, according to the service performed." The observance of that purpose necessarily involved the exercise of judgment and discretion by the Postmaster General. Nor is there any doubt that the Postmaster General when he first came to apply the act of 1873 made a distinction between at least two general classes of railroad routes, namely, those carrying mails six and seven days, respectively, having regard to the speed and frequency with which they were carrying the mails as well as to the character of the service performed. The law vested in him full discretion to do that, and the right and duty to exercise that discretion necessarily continued in the office of the Postmaster General. The discretion being vested by statute its exercise by one or more officials could not prevent its exercise by a succeeding one. *Macdaniel's case*, 7 Pet. 1, 14.

Nor did the act of 1873 repeal section 212 of the act of 1872 (sec. 3999, Rev. Stats.), which imposed a duty on the Postmaster General to contract for the transportation of the mails for a compensation within the maximum rates allowed by law or for less than the maximum rates if his judgment dictated that a reasonable and fair compensation would be less than the maximum. The act of 1872 had provided certain maximum rates to be paid "per mile per annum" and the act of 1873 declared that the "pay per mile per annum shall not exceed the following rates."

We are told that some years prior to 1873 the question of classification of the railroad routes with reference to "the size of the mails" and the other provisions of the law had been a matter of
47 difficult application and that the Postmaster General had originated a plan by which he called upon the railroad companies to furnish statements of the weights of the mails being carried, and to that end they were asked to weigh the mails for 30 consecutive working days. This they did in many instances, but at times they failed to do so. They weighed the mails being carried, on 6-day routes for the 30 days during which they were carried, and they weighed the mails on the 7-day routes during a period of 35 days. In both instances they reported as the average the totals divided by 30. These returns were made the basis of adjustments by

the Postmaster General where differences arose in the matter of settlements.

The importance of a change whereby the indefinite term "size" of the mails and other features requiring his judgment would be put in more definite form was called by the Postmaster General to the attention of Congress. We are told that the act of 1873 originated in his office and was intended to effectuate the plan he had conceived for making weight rather than size the basis of compensation. If it was intended to give concrete expression to a requirement that the mails should be weighed in the cases of the two classes of roads for 30 and 35 days, respectively, and the dividend in both cases be divided by 30, the language of the act falls short of making it so. It calls for an average and indicated the number of weighings, and hence literally the divisor is the number of weighings and the dividend is their sum. It limited the number of weighings to not less than 30 and left for the determination of the Postmaster General the number of successive working days on which the mails were to be weighed. It required weighing at least once in four years and left it for the Postmaster General to determine whether they should be conducted oftener. The times when they should be made and their frequency were not fixed by the act. If the act was a departure from the classification contemplated in the prior law, it did not prescribe in terms what differences should be made between routes performing different service. It was known to Congress that some routes were carrying the mails for 7 days a week, some for 6 days a week, and others for a less time. The relative proportion of 7-day routes to 6-day routes was about one to seven.

While making frequency and speed conditions upon which contracts would be made, the act did not in terms withdraw the injunction in section 210 of the act of 1872 (3997, Rev. Stats.) that contained the legislative expression of the reason and purpose of classifying the railway routes, and its proper observance rested in the discretion of the Postmaster General.

While section 210 of the act of 1872 provided maximum rates for three classes, the act of 1873 provided a graduated scale of maximum rates based upon average weight. It left, however, the adjustment of rates to intermediate weights in the hands of the Postmaster General.

Many features in the act of 1873 rest for their practical operation in the judgment and discretion of the Postmaster General. Some of these are stated in Chicago & Alton case, p. 507, and others are found in other parts of the law.

When the Postmaster General came to apply the law he found that the mails were being transported by different railroads for different numbers of days per week, some for 7 days, others for 6, and yet others for fewer days. The indicated purpose of the law relating to classification was that the difficult roads should receive, as far as practicable, a just and proportionate compensation, according to the service performed, and due frequency and speed were conditions entering into the contemplated readjustments. The rates mentioned were limited to designated standards, and the inter-

mediate weights falling between these standards could only be compensated for upon schedules left to the Postmaster General to adjust.

As to those intermediate weights he had discretion, because he could prescribe greater or less rates within the stated standards by making the proportion greater for the smaller intermediate weights than for the larger ones, or he could do the reverse.

The term "weight" had superseded the term "size" in the prior law, but actual weight could not be had without constant weighings, which were impracticable. The average weight carried became therefore the basis upon which the Postmaster General could contract if the railroad companies would agree. An actual average of 30 different weighings would not in the very nature of things show the actual weight transported because it changed (generally increasing) during the year, and the disparity became greater in proportion to the length of the contract term. The weighings were not confined to a given number of days but were to be for not less than a stated number.

The policy of Congress, as indicated by its general legislation on the subject, had been to leave the handling of the business in the Postmaster General's hands under such limitations as they saw fit to prescribe. His duties and his authority (sec. 6, act of 1872) were in a general way defined, among them being that he should "generally superintend the business of the department." In the revision of 1873 the department appears as one of the executive departments, and the Postmaster General is made the head of it. That the affairs of the Post Office Department bear more analogy to a large business enterprise than to a function of Government is apparent. That in the conduct of it much is and must be necessarily left to the judgment and discretion of its superintendent is also apparent. When, therefore, he found that the act of 1873 provided for an average weight of mail, according to which compensation was to be readjusted and under which contracts for their transportation should be made, was the law under which he was to act mandatory or directory merely? By directory provision it is meant that they are to be considered as giving directions which ought to be followed, but not as so limiting the power in respect to which the directions are given that it can not effectually be exercised without observing them. *Hubbert v. Lumber Co.*, 191 U. S., 70, 76; *De Visser* case, 10 Fed. 642, 648.

Whether an act is directory depends upon the sound construction of its nature and object and of public convenience and apparent legislative intention. If it be merely directory, a deviation from it may subject the official to responsibility to the Government, but can not be taken advantage of by third parties. *Bank v. Dandridge*, 12 Wheat., 64, 81.

In *Martin's* case, 94 U. S., 400, the court held that the eight-hour law of 1868 was a mere direction by the Government to its agent and did not affect the right of contract. This court has said in effect

in an opinion by Judge Barney that the act was merely directory. *New York, N. H. & H. case*. When the daily average was found by either method it was not controlling upon the roads because they could refuse to contract or transport the mails at all. If the act was mandatory a mathematical average would result

and the proposed terms could be adjusted within the maximum rate provided the carriers agreed. If the law was directory or permissive a method to be found by the Postmaster General could be adjusted to actual conditions. If he assumed that the rates were fixed or could be enlarged, he was plainly in error, because the courts have held otherwise. If the act was mandatory it marked a departure from the policy of Congress as regards the conduct of this great business enterprise. It had directed a classification to be made so that "as far as practicable just and proportionate compensation could be made, according to the service performed."

That the act was directory seems to have been the view adopted by the Postmasters General in the early stages of its application, because the defense of the usage in 1885 was based upon the justice of the practice then in vogue and not upon the absolute requirements of the law. Nor could they plainly read into the language of the act of 1873 a requirement that the mails be weighed 35 days and divided by 30. Speaking as it did of a number of weighings, not less than 30, and using the word "average," a literal application of the terms would call for a dividend made up of the sum of the terms in the divisor, and therefore for an actual average; but treating it as directory would authorize what may be called a permissive average deemed just to the government and the railroads.

It was materially supplemented in that regard by the act of 1875. By treating it as directory the long-continued usage of the department and the recognition thereof in the repeated appropriations by Congress can be supported. Being directory, it was left to the judgment of the Postmaster General, under such instructions as he considered just to both parties, to ascertain the daily average weight by some other than a mathematical rule. The power was not to be arbitrarily or capriciously exercised, and ample protection against that kind of action could be found in the right of the railroad companies to decline to accept the average as found by refusing to transport the mails or in the course suggested in *Jacksonville R. R.*, 118 U. S. 626, 628. And see *Martin's case*, 94 U. S. 400. It is clear that if the law permitted him to adopt a course of action which to him seemed just the original adoption of it or the continuance of the usage could not take away or limit the right, duty, or powers of his successors to act independently when in their wise discretion changed conditions seemed to warrant a change in the usage. Charged with the same or similar duties and responsibilities, his successors were vested with the same powers he had. Usage alone would not make it mandatory, and, except that a change in the usage would not be allowed to affect the rights acquired under a previous usage, its alteration can not be prevented by parties whose claims arise after full notice of the change. *Macdaniel's Case*, 7 Pet., 1; *Alabama Great Southern R. R. Case*, 142 U. S., 615.

When the Postmaster General came to apply the law he called upon the railroad companies, who were then conducting the weighings, to report the weights to him in accordance with the plan he had originated. The practice followed was to weigh the mail on 6-day routes for 30 days and on 7-day routes for

35 days. The Sunday weights on the 7-day routes were reported as part of the Monday weighings. The totals in both cases were divided by 30 and the quotients were accepted as the average daily weight. This daily average weight on the 6-day routes was thus an actual average, and that on the 7-day routes may be called a permissive average. Very generally the maximum rates prescribed by the statute and by the schedule of rates applicable to intermediate rates as formulated by the Postmaster General were applied to the daily average thus ascertained. If the law required an actual average in all cases it is plain that by the method adopted the 7-day routes were credited with more average weight of mail than they carried, and were therefore paid more than an actual average of their weights would have justified within the maximum rates prescribed by law, a course that can be justified only upon the assumption that the average to be ascertained under the law was not an actual average, but such an average as having regard to the other provisions of the law, the Postmaster General might adopt. That Congress was informed of the method adopted, and by repeated appropriations to meet deficiencies and appropriations based upon these estimates, which in turn were based upon said method, may well be taken as admitting that the Postmaster General's action was satisfactory to them. They appear to have been equally satisfied with the results of Order 412. They did not change it.

Within less than two years after the act of 1873 went into effect, the act of March 3, 1875 (18 Stats., 341), was passed. That act, we may assume, also originated in the Post Office Department. It provided for a change in the conduct of the weighings and required them to be made by employees of the Department. It carries a provision which we think is of importance in this connection. The prior act had required that the result of the weighings by railroads "be stated and verified in such form and manner as the Postmaster General may direct," while the later act directed that the Postmaster General "have the weights stated and verified to him by said employees *under such instructions as he may consider just to the Post Office Department and the railroad companies.*" [Italics ours.] We do not think that the full force of this expression is found in the suggestion that it merely authorized him to devise some just plan "for obtaining the gross weights," because it is to be assumed that he would have done that anyway. The studied phraseology of the act indicates a broader purpose. It mentions "such instructions as he may consider just to the Post Office Department and the railroad companies" with reference to having the weights stated and verified to him. The Postmaster General by the plan adopted had credited the 7-day routes with possibly one-sixth more than the actual average weight being transported. That he supposed he had the authority may be assumed from the fact that he so exercised it. And it is conceivable, at least, that he would desire a more concrete expression of legislative authority to continue the practice. *Chicago & Alton Case*, page 516. The act of 1875 may be accepted as authorizing instructions such as were given, whereby the Sunday weights were reported with the Monday weighings. The authority to give such instruction as he

51 might consider just necessarily involved the exercise of judgment and discretion. We see no reason why in the terms of the act of 1875 may not be found an escape from the literalism of the act of 1873, if it is not found in other provisions of the law, because we find that as late as 1884 the Postmaster General, in submitting the question to the Attorney General and stating the method of ascertaining the average weights said: "The weight on the Sundays being treated as if carried on Mondays." Such, then, were his instructions, because he considered that course just to the Government and the railroads. But that is not to say that the method pursued was mandatory upon the Postmaster General. The fact that he could give instructions involved the right to determine what the instructions should be, and what would be "just" was for his determination. The determination of it at one time, or by one or more Postmasters General, did not affect the right of others to give other instructions and to find that another course was just. The weighings every four years or oftener required, as they occurred, an observance by the then Postmaster General of the injunctions of the law.

The acts of 1876 and 1878 directed a reduction in the rates, and they were accordingly applied. It was under these acts that the cases arose wherein this court determined that the rates mentioned were maximum rates. They did not affect or establish the divisor.

No further legislation occurred affecting the questions until the act of 1905, which provided that the mails should be weighed for not less than 90 successive working days. Except for the change from 30 to 90 the act of 1905 uses the language of the act of 1873. If literalism be indulged, the language would seem to indicate a change rather than a confirmation of an existing method, but we think the correct view is that Congress still left the discretion of the Postmaster General unimpaired. That law did not make permanent or obligatory any divisor.

The next act was that of March 2, 1907, which changed the rates with reference to roads carrying upward of 5,000 pounds of average weight of mails per day. That act did not affect the method of ascertaining the average. Its requirements are met when, to the average ascertained according to a directory statute, the proper rates were applied, the railroads having still the right to refuse to contract at all.

On June 7, 1907, the Postmaster General issued Order 412, which provides "That when the weight of mails is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day." No attempt to apply this rule to existing contracts was made. The rule was intended to be and was applied prospectively in the several contract sections as the quadrennial weighings occurred. We do not find that this rule is subject to the objections which the plaintiffs have urged against it.

Turning now to the contentions of the plaintiffs:

(a) That the railroads were by statute declared to be post roads. No significance attaches to that fact in these cases.

The same statutes declare that canals and plank roads shall be post roads. It has been correctly stated that the establishment by law

of all railroads as post roads means nothing more than that the mails could and might be carried over such railroads as over the ordinary public highways, and the mere fact of making such declaration did not, even by implication, indicate that the United States could or would undertake, without the consent of the railroad companies and without making compensation therefor, require any railroad company to transport the mails over its lines. *Atlantic & Pacific Telegraph Co.*, 2 Fed. Cases, 632; *State of Pennsylvania v. Wheeling*, 18 How., 421, 441. Post roads and post routes are not synonymous terms. *Blackham v. Gresham*, 16 Fed. Rep., 609, 611; Congress declares what are post roads, and it requires action by the Postmaster General to authorize railway postal routes.

(b) That what is called the long-continued departmental construction of the act of 1873 is controlling.

It was stated in the *Chicago & Alton* case, page 492, that in the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law and were appointed to carry its provisions into effect is entitled to great respect, and ought not to be overruled without cogent reasons and may be accepted as determining its meaning. By accepting the view above stated, that the law was directory, and not mandatory with reference to the ascertainment of the average weights, we can find support for the departmental usage that was so long continued. If, on the other hand, the act was mandatory and literal it was not pursued correctly. "It will not be contended that one Secretary has not the same power as another to give a construction to an act which relates to the business of the department. And no case could better illustrate the propriety and justice of this rule than the one now under consideration." *Macdaniel's case*, 7 Pet., 1, 14. Such is the rule where the change is made prospective and is not given a retroactive operation. The claims asserted here arose after the Postmaster General had changed the order, and they are in no sense rights vested or accruing under a former construction or usage of the department. The distinction is illustrated by *Macdaniel's case*, where an employee of the Navy Department was held entitled to certain compensation, because he had rendered services under a construction which obtained during the time of the service. He was not claiming under the changed construction, but his rights arose during what may be called the erroneous construction. The distinction is also noted in *Alabama Great Southern Railroad Co. case*, 142 U. S., 615, 620, where the general rule contended for by plaintiffs is stated, and it is said that the courts will look with disfavor upon any sudden change whereby parties "who have contracted with the Government upon the faith of such construction may be prejudiced"; and it stated further: "It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive, and to require from him the payment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the Government." The construction or usage "must be considered binding on past transactions." *Macdaniel's case*, *supra*, page 15.

In *Midwest Oil Co. case*, 236 U. S., 459, the Supreme Court, three

justices dissenting, held that the long-continued practice by the Chief Executive of withdrawing public lands sustained the right to do it in the particular case, though there had been no statute authorizing it. Referring to the cases of continued practical construction it was said, page 473: "These decisions do not, of course, mean that private rights could be created by an officer withdrawing for a railroad more than had been authorized by Congress in the land-grant act." "Nor do these decisions mean that the Executive can by his course of action create a power." The court held that a long-continued exercise of the authority was sufficient to sustain action after it had been taken as against parties whose rights arose thereafter, but it was not held that the rule was mandatory and could not be departed from. Nor indeed can it be stated that the rule is so general as to be applicable in all cases involving departmental action because a principle inhering in our system is that it is a government of laws. It would be a strange conclusion to reach that departmental usages founded on its own construction of the statute can not be changed by the same authority which gave them birth. The Congress may enact a law which they can amend or repeal; the courts may construe a statute and modify or overrule their decisions. Is the executive branch alone so hampered that it may not modify or change the construction or the usage or practice or methods it may have adopted when such modification or change is given a prospective and not a retroactive operation and when the claims asserted did not arise until after the usage is changed, and particularly when the usage originated in the exercise of a directory authority?

(c) It is, however, further contended by plaintiffs that their view does not rest solely upon departmental construction, but that it is also sustained by the effect to be given to the passage of the act of 1905 as well as of the acts of 1876 and 1878. Particular stress is laid upon the acts of 1905 and of 1907.

Exception is taken in one of the briefs to the statement in the Chicago & Alton case (p. 512) that "it is evident that Congress was not satisfied with the average weights being obtained, whether the dissatisfaction arose from the method or the result, and they therefore changed the law to insure a more satisfactory average." It can not be denied that under the terms of the act of 1873 the Postmaster General could have weighed the mails for 90 days, more or less, because that act called for weighings for "not less than 30 successive working days." When, therefore, we find a direction in the later act that they shall be weighed hereafter for not less than 90 successive working days, it must be concluded that Congress had a purpose in making the change. If satisfied with the results under the prior law, why enact the later one? If the exception be to the use of the word "method" in that connection it may be conceded that it was not essential to the thought conveyed. It was in effect, if not in words, held that the act of 1905 was not a legislative adoption of the prevailing method for ascertaining the daily average weight and if Congress did not have that method in mind it would seem that the act had no bearing on the question of a fixed divisor one way or the other, since there is nothing in its language to show that they had. Our view of the meaning of the act of 1905 is that

it did not affect the powers of the Postmaster General in any regard, whether such powers were statutory or discretionary, mandatory or directory, except to require weighings for not less than 54 90 successive working days. We might upon that point accept the statement found on different briefs as follows: "This act changed neither the rates nor the basis of pay, but contains the same provision with reference to said basis as that embodied in the act of 1873;" or

That the act "means the same thing in every particular that the act of 1873 meant, whatever that was;" or

That "it lengthened the period for demonstration by weighing but made no change in the elements to be considered nor in the manner of their use or combination;" or

"This act of 1905 did nothing more than make the weighing period include 90 instead of 30 working days."

If, on the other hand, its purpose was to require "a longer period of weighing by which to get, as was supposed, a fairer average of weights," it certainly authorized the official charged with that duty to adopt a method which would accomplish the desired result. The fact that when the act was upon its passage in the House the chairman of the committee changed the language of the bill as reported so that "there could be no question of the construction that can be made of the law" merely confirms the view that the act was not intended to change the law except as to the number of weighings. In fairness it should be stated that plaintiffs did not by the expressions quoted intend to concede our interpretation of the act of 1873, but they can not find in its terms a positive mandate to pursue the course adopted by the department, and they must have recourse to what is termed the long-continued departmental construction or legislative adoption thereof. Their contention leads to the conclusion that the Postmaster General gave an authoritative and final construction of the statute. This, we think, is beyond his power. The statute does not confer the power of legislation, nor can the exercise of the power have the effect of legislation. *United Verde Copper Co.*, 196 U. S., 207, 215. Every statute, to some extent, requires construction by the public officer whose duties may be defined therein. He must read the law and must, therefore, in a certain sense construe it in order to form a judgment from its language what duty he is directed to perform. *Roberts' case*, 176 U. S., 221, 231. There is, however, a distinction between acts involving the exercise of judgment or discretion and those which are purely ministerial. With respect to the former the courts are without power to control executive discretion, but with respect to ministerial duties an act or refusal to act is or may become the subject of review by the courts. *Noble v. Union River Logging Co.*, 147 U. S., 165, 171. We think the course pursued was a matter of usage or practice rather than of construction and finds its support in whatever discretion the act of 1873 vested the Postmaster General with, taken in connection with other provisions of law, supplemented by the act of 1875 authorizing such instruction as the Postmaster General deemed proper. It appears that in "a documentary history of the railway history from its origin, in 1834," which was

transmitted to Congress in 1885 by the Postmaster General it was stated that while there had been some little controversy at one time "as to the justness of the present method" of obtaining the daily average weights a little examination would show that "no other way of proceeding could be so just as that now in vogue." Thus

55 it was because he and his predecessors thought that the method was just to the railroads and the Government that he adopted the usage. Proceeding to state that method it is explained in the history that on the 6-day routes the sum of 30 weighings are divided by 30 and "give the daily average," while on the 7-day routes the "weighing is done for 35 successive days (including Sundays) and the aggregate divided by 30 for a basis of pay." Why a succeeding Postmaster General could not with equal right adopt a method of finding an actual average on 7-day routes and dividing the aggregate of 90 days weighings on 6-day routes for a basis of pay is not made entirely clear, when it be assumed that in his wise discretion he decided that the new method was just to the department and the railroad companies and had a proper regard for the purposes of the law.

In the hearing before a congressional joint committee in 1914, it is shown that in 1873 there were 684 six-day routes and only 97 seven-day routes. The aggregate mileage of the first class was then approximately 48,000 miles and of the latter 15,000 miles. The annual pay to the six-day routes was approximately four and three-quarters millions and to the seven-day routes it was approximately two and a half millions of dollars. Charged with the duty mentioned the Postmaster General found the daily average weights, as has been stated, and his action was followed until 1907. When he came to consider the situation in 1907 he found, instead of 684 six-day routes as in 1873, that they had increased to about 1,394 in number, with an aggregate mileage of about 49,000 miles, while the seven-day routes had increased in number from 97 in 1873 to about 1,600 in 1907, with an aggregate mileage of 153,000 miles. While, therefore, the six-day routes about doubled in number in the 34 years the seven-day routes had increased by about 16 times their number during the same period.

From receiving somewhat more than a third of the whole compensation paid for mail transportation by railroads in 1873 to both classes, the seven-day routes were being paid in 1907 about thirteen times as much as the aggregate of the six-day routes. That is, the six-day routes were being paid approximately three and a quarter millions of dollars per annum in 1907, and the seven-day routes were receiving over forty-one millions of dollars.

Assuming that the weights carried bore some proper relation to the pay received it would thus appear that the seven-day routes (which carried so much smaller aggregate weight in 1873 than six-day routes) were transporting in 1907 many times more weight than the six-day routes were transporting.

The relative positions of the two classes had changed in 1907, as

has been shown. The greater mileage and the greater weights appeared on the seven-day routes.

When the Postmaster General laid out his course in 1873, he adopted as a basis for the actual average the six-day routes, they being the more in number and carrying the greater weights. He or some of his immediate successors adopted the same divisor for the seven-day routes "as a basis for pay."

If by the act of 1905 there was to be a longer period of weighing by which to get, as was supposed, a fairer average of weights, and only one divisor was to be used, it can not be reasonably affirmed that a fairer average is not attained when, considering all the routes, the basis is laid upon the class which is greatest in number and handles the larger weights.

We are told in one of the briefs that the readjustments of compensation were made upon the basis of "six round trips per week," and it is hence stated that "Sunday service never was and is not now within the contract and could be discontinued at any time without a reduction of compensation."

If such be the case, does it tend to support the claim that they be credited each day with an increased average? The theory was that as the seven-day routes carried mail more frequently than others, their daily average should not be actual, and it was increased by the method used. If they voluntarily transported the mails on Sunday, they can not recover for the service; and if they do not contract to do so, why may not the Postmaster General, under such instructions as he may consider just to the parties and within the terms of the law, find the actual average and accordingly agree to pay for what the carrier does contract to carry?

We do not mean to imply that the provision as to six round trips per week means what plaintiffs suggest. The postal laws and regulations provide for deductions for failure to perform trips, and it is probable that the failure to transport the mails as agreed is visited with fines and deductions. The act of 1906 requires as much.

But the contention is that the divisor became fixed by the passage of the act of 1905 because, it is urged, "that the enactment by Congress without change of a statute which had previously received long continued executive construction is an adoption by Congress of such construction."

The rule stated is found in the *Hermanos* case, 209 U. S., 337, 339, is rested upon the *Falk* case, 204 U. S., 143, and is repeated in the *Komada* case, 215 U. S., 329, 396. These cases are mentioned in the *Chicago & Alton* case. In referring to the *Hermanos* case it was said that the opinion stated that the contention of the Government that the paragraph under consideration separated distilled wines in bottles into three classes and fixed a specific rate of duty on each and that (1) the court thought the contention was right and needed no comment to make it clear; further, that counsel for the Government "also pointed out" that the tariff act of 1875 and subsequent acts were substantially similar to the paragraph under consideration and that Treasury decisions were in accordance with the interpretation for which the Government contended, and, therefore, it was said,

(2) "We have stated that when the meaning of a statute is doubtful great weight should be given to the construction placed upon it by the department charged with its execution," citing *Robertson v. Downey*, and another case, and (3) the rule above quoted is then stated. It was to this third proposition, in its nature distinct from the other two mentioned, that the *Falk* case is cited. Two of the justices concur "solely because of the prior administrative construction," from which we infer that they did not agree that the first contention of the Government was right and needed no comment to make it clear and hence concurred solely upon another ground, the statement relative to which was in the second proposition, above stated. We repeat these observations not because they are essential to the conclusion we reach but as tracing the history of the rule.

57 The decisions of the Supreme Court are controlling in this court and their statement that a rule had been announced is authoritative. It is not for us to question the accuracy of their statement, but when called upon to apply a stated rule we must consider the facts of the case to which the rule is sought to be applied, and we may refer to the conditions under which the rule was announced, because the rule is applicable where similar conditions present themselves. In the cases mentioned the court was considering tariff legislation; and, as is well known, the proper application of tariff provisions frequently calls for construction of the law under which those charged with its execution may proceed and the rights of importers become fixed. Their construction does not involve a discretion to do one or another thing, but does involve a positive duty to execute the law. Men direct their business and import their goods in reliance upon an adopted construction. Provision is made for hearings in tariff matters, where an interpretation of the act may be had, and the Treasury decisions are reported. It may be that the statement of the rule is not to be limited by the character of the cases in which it was announced, but we do not think it was meant that in all cases where a statute uncertain in terms is reenacted without change the court must ascertain from the department charged with its execution the construction which that department put upon the prior act. The court is not absolutely bound to give, but may give, the departmental construction a controlling effect. *Chicago & Alton* case, page 492. And where a given rule is invoked we may have regard to the reason for it, because, generally speaking, the reason ceasing, the rule itself need not be applied.

We do not think it necessary, however, in these cases to even attempt to qualify the rule stated. In an applicable case we would not feel authorized to do so. The rule does not apply here, because we are concerned with what is called a construction, but which is, we think, a usage that had its origin in the duty of exercising judgment and discretion and not in interpretation of doubtful terms under which rights would vest, or which, if changed, would defeat or injuriously affect those rights. If when authorized to adopt a course which to him seemed just to the Government and the railroads, the Postmaster General could pursue the one or the other method of ascertaining the contemplated average then manifestly the method

adopted by one could be altered by another so long as the change was made prospective, because being charged with all the duties imposed by law the succeeding Postmasters General were vested with all the powers conferred by law.

The claims of the plaintiffs arose after the issuance of order 412, and no retrospective effect was given to that order. The right to give instructions as to the weighing was as absolute in 1907 as in 1873.

With the wisdom of the change, so long as the right to make it remained, the court has nothing to do. Wright's case, 11 Wall., 648.

It may be remarked that the expression in the cases of an unwillingness by the court to depart from a long-continued departmental construction of an uncertain or ambiguous act is referable to the court's action when called upon to construe the law, and they do not in general refer to the right of a department itself to change its construction while giving it a prospective operation.

58 (d) That proceedings had in Congress at or before the passage of the act of 1907 were a legislative adoption of the divisor of 30 or a recognition of it as a requirement of law.

The act of 1907 did not affect the method of ascertaining the daily average weight. It reduces the rates, and it may be observed that while legislation has touched in rare instances since 1873 the question of compensation, it has uniformly been in the direction of reducing it, except in a limited way as the act of 1907 may affect land-grant roads. Only once since 1873 has legislation referred in terms to the ascertaining of average weights, that being the act of 1905. It may be conceded that by the literalism of the act of 1907 the Congress fixed the rates thereafter to be paid on certain routes, and thus for the first time made a rate that was other than a maximum rate. But in doing that no change was made in the right, power or duty of the Postmaster General to ascertain the average weights under the permissive features of the law.

As bearing upon the effect of the act of 1907 and upon the method of ascertaining the average weights then in vogue, it is earnestly urged that certain proceedings in Congress, as well as the act of 1907 itself, evidence a purpose on the part of Congress to make permanent the divisor then being used, and that such effect must be given to said act and proceedings.

It is plain that the act does not in terms say what the divisor shall be. The House committee's bill, as reported, provided a method for ascertaining the daily average weight "by the actual weighing of the mails for such number of successive days, not less than one hundred and five." Accompanying the bill was a report explaining the prevailing construction and practice and that the purpose of the said provision was to change the method of ascertaining the daily average weight. This provision in the bill was confessedly subject to a point of order under the rules of the House, and it was accordingly so ruled later. The two amendments offered by a Member were ruled out of order by the Chairman and his ruling was sustained upon appeal. These proceedings were being had in Committee of the

Whole House on the state of the Union. The vote that was taken was upon the correctness of the Chairman's ruling, and not upon the merits of the proposed amendments. Placing his ruling upon one of the grounds stated by him that an amendment which will have the effect of changing the discretion vested in an executive officer by law is a change in existing law, the ruling would seem to be correct if we may have recourse to the precedents wherein it is held that an amendment to an appropriation bill having that effect is subject to a point of order. (Hind's Precedents, vol. 4, pp. 569, 570, secs. 3848 et seq.) It may be questioned whether proceedings thus had in Committee of the Whole House on the state of the Union amount to legislation. They can not be accepted as showing the meaning of an act that was adopted containing no reference to the method of ascertaining the average weight. These proceedings were had two years after the act of 1905, where some reference is made to average weights. That the amendments proposed, and for that matter the committee's amendment, would have made definite and mandatory a method of finding the average weight and would have removed any permissive or directory feature in the law or any discretion of the Postmaster General in its application is plain.

59 Assuming that the statutes under which he acted had authorized the Postmaster General in his discretion to adopt one or another method, the use of the divisor 30 was not mandatory upon his successors, and since Congress has not changed the law, that power continues. We can not say that the refusal of the House, if it were so, to make permanent law on the subject was in fact or effect a making of the divisor fixed and absolute. They can not be said to have included an element which they excluded. Since they refused to adopt the proposed amendments which would have removed the discretion and would have made a fixed divisor of 105, we can not say that they removed all discretion and made a divisor of 90 when the legislation omits any reference to either. Nor is the situation altered by reference to other proceedings in the House and Senate.

The courts have consulted legislative proceedings to learn the history of the period, and it is said in the Tap Line cases, 234 U. S., 1, 27, that the debates may be resorted to for the purpose of ascertaining the situation which prompted the legislation.

In *St. Louis & Iron Mountain Railway Co. v. Craft*, 237 U. S., 648, Mr. Justice Van Devanter delivering the opinion, interpreted the law in question according to its terms and then made "a brief reference to the peculiar circumstances in which the new section was adopted," to show that they gave material support to the conclusion to which the court came after considering the terms of the act. After stating the reports of the Judiciary Committees of the two Houses, he adds (p. 661) that while these reports can not be taken as giving to the new section a meaning not fairly within its words, they persuasively show that it should not be narrowly or restrictively interpreted. The act was not silent upon the question involved, and its terms were construed, and this not by what the proceedings showed but by what was "fairly within its words."

Similarly, in *Delaware & Hudson Company case*, 213 U. S. 366, reference is made to certain legislative proceedings, but the court declined to extend the meaning of the statute beyond its legal sense because of a supposed intention not manifested in its terms, and it was said by the Chief Justice that if the mind of Congress was fixed upon a stated proposition, "then we think its failure to provide such a contingency in express language gives rise to the implication that it was not the purpose to include it." This court, in *Atchison, Topeka & Santa Fe R. R. case*, 52 C. Cls., 388, referred to proceedings in Congress for the purpose of ascertaining the subject matter of legislation, to which the mind of Congress was addressed, and to which they gave expression. We can not think that the refusal of one or both Houses to legislate upon a given subject amounts to making mandatory a law which was permissive, or to the withdrawal of a discretion with which an executive officer was charged.

The other cases cited on the briefs are not in conflict with our view.

We hold, therefore, that the Postmaster General had the same authority in 1907 that he had in 1873 and 1875, and thereafter, whether the law contemplated an actual average or a permissive one. Other contentions of plaintiffs are concluded by what has been said.

The case of the land-grant roads depends upon the validity of Order No. 412, and we can not say it was an unlawful exercise of the Postmaster General's discretion under the law. It may be added that the action is by a plaintiff on parts of whose lines are
60 land-aided sections and that the plaintiff contracted for all classes of its routes.

As to all plaintiffs, being free to contract, the considerations to be stated are controlling. Whether the daily average weight should be ascertained according to the literal terms of the act of 1873 or according to the discretion of the Postmaster General, having regard to the questions left for him to solve, the result is the same because in either case their rights were fixed by their contracts to transport the mail.

Second and chiefly: The actions are upon contract. Under the views expressed herein, and in the *Chicago & Alton* and the *Yazoo & Mississippi Railroad Company cases*, no further discussion of the contention that the statute fixed the compensation is necessary. There was no statutory contract.

It is contended, however, that there was no express contract, and that recovery should be had upon a supposed implied contract, the damages or compensation to be ascertained as upon quantum meruit. While this contention would seem to be a departure from what we think is a proper conclusion from the averments of the petitions, that consideration may be pretermitted.

The general rule is that where one party, at the request of another, does work and labor or performs service for the benefit of such other, the law will imply a promise on the part of the one receiving the benefit to pay the reasonable value of the work and labor done or the service performed where there is no express contract between them fixing the terms upon which the service is to be performed.

"Indebitatus assumpsit is founded upon what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay to the plaintiff. Where the case shows that it is the duty of the defendant to pay, the law imputes to him a promise to fulfill that obligation * * *. But the law never implies a promise to pay unless some duty creates such an obligation, and more especially it never implies a promise to do an act contrary to duty or contrary to law." *Curtis v. Fiedler*, 2 Black., 461, 478; *United States v. Russell*, 13 Wall., 623, 630.

By an express promise a party may agree to pay more than the work and labor done or the service performed is reasonably worth, or he may agree upon a measure for ascertaining the value of the work and labor done or service performed.

It was stated in the *Yazoo & Mississippi* case that the record did not show a basis upon which the court could properly adjudge what was the reasonable value of the service performed, and plaintiffs urge that the compensation paid for similar service under prior express contracts should be taken as proof of what the service rendered under the implied contract was reasonably worth—that the former course of dealing, in the absence of more definite proof, is sufficient to establish the essential fact. The contention overlooks, however, an important element in the prior express contracts. That element was the authorized exercise by the Postmaster General of discretion in proposing or agreeing to the compensation, and the court can not supplant his discretion by any of its own, because it has no discretion. What he did in the exercise of his discretion and the performance of his duties when considering his course with reference to a given average weight and the terms of a contemplated contract can not be accepted as proof that a service performed after he had exercised his discretion in another way is to be paid for on the basis which he has rejected. The rule could be applied, as has been done, where both parties understood that the service was being performed without any stipulation by both or offer by either of the terms. To apply it in these cases leads to the result that by refusing to accept the Postmaster General's proposal the carriers can carry the mail, receive regular installments of pay therefor, according to the terms of an offer; and by withholding express assent to a vital term in the offer can impose a contract upon the Government which its agent refused to make. It is well established that a contract can not be imposed upon the carrier. It was not until the act of 1916 that carriers were not free to accept or reject the proposals of the Postmaster General and to refuse to transport the mail.

61 The carrier's rights being well defined, its duties to accept the proposed terms or to refuse to transport the mail is apparent. By its refusal the Postmaster General would have been obliged, in the performance of his statutory duty, to have made other arrangements or to have offered more satisfactory terms. The law will not raise up a promise which involves the breach or defeat of a statutory duty.

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When proceeding in a proper case to ascertain reasonable compensation as upon quantum meruit, the pay is commensurate with the service rendered—"that payment should be made for what was done." *Jacksonville, P. & M. R. R. Co.*, 21 C. Cls., 155, 170; *Railroad v. United States*, 101 U. S., 543, 549. A right to recover as upon quantum meruit implies that the party should have such payment as he deserves for the services performed.

To be entirely accurate in such a matter the carrier would have to be paid for the weights carried. These can not be known, and the only basis for them is the ascertained average.

As to the seven-day routes, there can be no question that upon the fullest application of the rule they can not recover as upon quantum meruit in face of the acknowledged fact that they have received payment for the average weight of mails actually carried. Their claims are illustrated near the beginning of this opinion.

If it be conceded that because of a lawfully vested discretion the Postmaster General was authorized to contract with railroad companies upon the basis as to 7-day routes of a permissive or factitious daily average weight, and at the maximum rates prescribed by law, and further that Congress by their repeated appropriation recognized or approved his action in that regard, as they had the right and power to do, it must yet follow that a court is without right to increase either the daily average weight or the rates prescribed by statute, whether they be maximum or fixed rates.

On the other hand, if their case rested alone upon that question, it might be said that the average on the 6-day routes could not be decreased. Certainly quantum meruit does not mean that they shall be paid for more average weight than they carried, for more service than was performed, and if the 6-day routes are not strictly in that situation, it yet follows that the view next stated is determinative and is applicable alike to both classes of routes.

The mails were transported under express and not under implied contracts.

62 Upon the receipt of the distance circular the carrier signed the acceptance, in some instances without qualification, in others with an exception noted therein by its officer, protesting an unwillingness to be bound or refusing to be bound by Order 412. It may be conceded that as to those so objecting there was up to that time no meeting of the minds, and consequently no contract between the parties. Standing alone, "plainly no contract between the parties resulted from the correspondence so far had between them." It is equally true that if the acceptance clause had been signed without exception a carrier could not have sued the Government as for a breach of contract if the mails had not been subsequently offered, because it was yet open to the Postmaster General to adjust the compensation and propose his terms. He was still charged by the statute with the duty of contracting within the maximum rates or for such compensation as he regarded as just and reasonable. But more occurred. The Postmaster General informed the protesting carriers that they could only carry the mails in accordance with the rules, regulations, and laws, and thereafter when he sent to the several

plaintiffs the result of his computation, it stated the terms of his proposal. It was not a four-year contract, but was a readjustment of compensation, "unless otherwise ordered," which had the effect of limiting the duration of the contract. *Eastern R. R. case*, 129 U. S., 391; *Delaware & Lackawanna R. R.*, 51 C. Cls., 426. It also stated that the carrier was subject to fines and deductions and to the rules and regulations of the department, and Order 412 was one of these.

A carrier which had qualified its acceptance of the distance circular was not bound to accept the proffered terms. A contract could not be imposed upon the carrier (cases *supra*), nor could it compel the letting to itself of a contract for mail transportation. As is stated in one of the briefs, "it was for the Postmaster General, acting upon his own appreciation of the extent of his lawful power to propose terms, and for claimant, not compelled by law to perform such service, to accept or reject the terms proposed as it saw fit." And while this statement was apparently intended to apply to the situation of the parties as they stood when plaintiff had qualified the terms of the acceptance clause, it none the less correctly states the attitude of the parties thereafter until plaintiff had received and transported the mails and had received periodical payments therefor in accordance with the readjustment notice. The carriers accepted these payments without objection of any kind.

In the *Eastern Railroad Company case*, *supra*, it was said by this court:

"When the extent of an implied contract or the meaning of the language of a written contract are in controversy, the intention of the parties becomes all important. Their acts at the beginning and during the term of the contract acquiesced in on both sides, the claims and its acts at the time amounted to an acceptance of his offer." go very far to explain, if they do not actually establish by way of estoppel, the actual contract between them as well as its proper interpretation. (*Otis v. United States*, 19 C. Cls., 467.) The present claimant having no clear and definite time contract was bound to take notice of the Postmaster General's offer of future compensation, and its acts at the time amounted to an acceptance of his offer."

63 This case was affirmed in 129 U. S., 391; and it is there said (p. 396):

"Chief Justice Richardson, speaking for the Court of Claims, properly said that the order for the reduction under the act of 1878, and the notice thereof to the company 'constituted an offer on the part of the Postmaster General which the claimant might decline or accept at his pleasure.' Having received the reduced compensation without protest or objection, it may be justly held to have accepted that offer."

In the *Martin case*, *supra*, the Supreme Court stated two principles, both of which are applicable in these cases: The one that the act was merely directory and did not interfere with the freedom of contract, and the other that as the parties were free to contract, effect

was to be given to the action and conduct of the plaintiff in having repeatedly accepted, without protest or objection, payments based upon the contract as the Government understood it to be. Other courts have applied the same principles.

In Coleman's case, 81 Fed., 824, it is held that even if the construction of the statute therein mentioned is too broad, and the petitioner be entitled to its benefits, he would yet have no right of action in the absence of notice by protest or objection that the payments were not in discharge of the liability.

In Timmonds' case, 84 Fed., 933, the Circuit Court of Appeals, Seventh Circuit, took the same view, and, referring to Martin's case (p. 934), said:

"It was there ruled that the provision in question is in the nature of a direction by the Government to its agents, and is not a contract between the Government and its servants; that it does not specify what sums shall be paid for the labor of eight hours, nor that the price shall be larger when the hours are more, or smaller when the hours are less;" that being in the nature of a direction, the statute does not constitute a contract to pay for the excess time and that the employee "was under no compulsion, he could have abandoned his service if it proved distasteful or onerous," just as plaintiffs here could have done if there was no express contract.

In Moses's case, 126 Fed., 58, the Circuit Court of Appeals, Ninth Circuit, took the same view of the contractual relations between the parties.

In Averill's case, 14 C. Cls., 200, 206, it is held that where the employee continued to work, was paid by the day and accepted the payments, he could not maintain his action based upon the theory that eight hours constituted a day's work. Gordon's case, 31 C. Cls., 254.

In McCarthy v. Mayor, 96 N. Y., 1, the court took the view that the act before them was intended to place the control of the hours of labor within the discretion of the employee rather than of the employer, and yet held that unless there was an express contract providing for extra compensation, it could not be implied.

In Grisell v. Noel Brothers, 36 N. E., 452, the Indiana Appellate Court said that the statute permitted parties to contract, and that if one person employs another to perform work for a stated sum, and at the end of the time pays that sum, and the employee accepts it in payment, he can not afterward recover an additional sum albeit he may have worked for longer hours.

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"The acts and conduct of the parties in the case supposed are such as to raise a conclusive presumption that the amount received by the employee was accepted in full payment of what was due him. The same rule applies where the work is done by the week or month or year."

It appears in that case, as it does in these, that the plaintiff knew when he entered upon the service the nature and amount of work

that was required of him, as well as the compensation he was to receive therefor, and it was said that if he was not satisfied at the end of a day or week with what was being paid him, he should have exacted an agreement for more compensation or exercised his right to quit the employment.

"By continuing in the employer's service under the terms of the employment, he waived any right to claim additional compensation."

The principle is illustrated by *Vogt v. City of Milwaukee*, 74 N. W., 789, where an employee worked 8 hours daily for the first 30 days, and thereafter, without protest, worked 12 hours a day and received the same pay. A city ordinance had provided that 8 hours should constitute a full day's work for city employees. The plaintiffs sued for compensation for overtime and contended that the ordinance entered into and became a part of the contract, and that thereby the city became bound to pay the amount specified for each day of 8 hours' service. A similar contention is made in these cases. The Supreme Court of Wisconsin held otherwise, and said (p. 791):

"The law which allows contracting parties, through the medium of an express contract, to fix in advance the value of a service to be rendered, also allows them to fix the value in cases of implied contract after the service has been rendered. It may as well be fixed by acts of the parties as by express agreement. Here it seems certainly to have been fixed by acts of the parties, and the plaintiff can not now be permitted to dodge or escape the legal effect of his conduct."

It is unnecessary to multiply cases (though some are cited below) to establish the rule that the existence of contractual relations or the acceptance of a proposal can as well be shown by the action and conduct of parties as by their language. What a party does can as well conclude him as what he says he will do. Each time a plaintiff was paid, and received the compensation stated, it "as effectively notified him that his compensation for the time in service was the rate so specified as if he were formally notified." *Vogt v. Milwaukee*, supra, citing *Miller case*, 14 C. Cls., 200.

It was held in *Baird's case*, 96 U. S., 430, where the plaintiff had presented an unliquidated claim to an accounting officer, claiming over \$150,000, which they reduced to about \$97,000, and then sent him a voucher for the latter amount, which he received without protest or objection, that he was concluded by his action in accepting the payment.

The rule was applied in *Garlinger's case*, 169 U. S., 316, 322, and was recognized in *McMath's case*, 51 C. Cls., 356.

Cases supra; *Central Pacific Co.*, 164 U. S., 93, 97; *Illinois Central R. R. Co.*, 18 C. Cls., 118, 132, 136; *Jacksonville, Pensacola & Mobile Co.*, 21 C. Cls., 155, 170, 171; 118 U. S., 626; *Minn. & St. Louis Ry.*

65 Co., 24 C. Cls., 350, 360; *Alabama Great Southern R. R. Co.*, 25 C. Cls., 30, *ibid.* 142 U. S., 615; *Texas & Pacific Ry. Co.*, 28 C. Cls., 379, 390; other cases; *Chicago & Alton Case*, p. 521, 532.

If any effect is ever to be given to a party's action as determining the existence of a contract, these cases call for its application.

It is admitted that the carriers received and transported the mail after the alleged exception to Order 412; admitted that they received compensation in accordance with the readjustment notice; admitted that this compensation was paid monthly or periodically; admitted that the readjustment of compensation was made for no definite period, but "unless otherwise ordered;" admitted that the readjustment of compensation was subject to fines and deductions; admitted in at least one of the cases at bar, and it may be assumed as to others, that fines and deductions were imposed and retained without objection; admitted or shown that the notice stated that the compensation was based upon not less than six round trips per week; admitted or shown that no objection to the payments was at any time made, and that several years intervened before suit, and these things being true, the action and conduct of the plaintiffs were plainly inconsistent with their present contention.

The distance circular proposed no terms and the readjustment notice did. It was the acceptance and transportation of the mail and the repeated acceptance of the monthly or periodical pay after the Postmaster General had replied to the protests, all without protest or objection, that consummated the contract, the terms of which were evidenced by the notice itself. While the carrier had protested it would not consent, it yet consented. A party will not be heard to deny the natural and reasonable effect of his action as regards his contractual relation or to take a position inconsistent therewith when to do so would involve a breach of official duty by the other contracting agent. The law required the Postmaster General to make contracts for mail transportation, to file copies of them (Rev. Stats., sec. 404), and to enforce fines and deductions under the terms of his contracts with railroad companies (act of June, 1906). It did not lie with the carrier to defeat these requirements by a refusal to accede to one term of the proposal and then pursue a course of action antagonistic to the suggested refusal. It can not compel the leaving of the contractual relation to be implied. It could have refused the terms or it could have accepted. It could not select those that served its purposes and leave to the incertitude of the future the ascertainment of the terms upon which the mail was being transported. In a matter of so great public importance, it was its duty to be definite and to speak if it did not intend to be bound. Their action establishes the essential fact. The plaintiffs transported the mails in accordance with the terms proposed by the Postmaster General, and, having been paid the sums respectively due them, it follows that their petitions should be dismissed. And it is so ordered.

BOOTH, Judge, concurring:

I concur in the opinion of the court and might well rest the matter with this statement. Having, however, positive conviction as to the case itself it may not be amiss to briefly discuss some features of the litigation which lead to the foregoing opinion.

66 The relationship between the carriers of the United States was contractual. The Postmaster General was free under the statute to negotiate and consummate such contracts for the carriage of the mails as he deemed just to both the contractor and the Government, subject only to the express limitations enumerated in the act of 1873. The limitations in the act of 1873, in so far as the present case is concerned, circumscribed alone the maximum compensation to be paid the contractor and prescribed a minimum period of weighing to ascertain the "average weight per mile per annum" upon which the compensation was to accrue. There is nothing aside from these provisions in the statute which irrevocably bound the Postmaster General to contract with the carriers on the basis of the mathematical process adopted by him after the statutory weighing period had been observed; he might pay the maximum compensation; he might pay less; and surely was invested with the official discretion indispensable to the making of an agreement fair to both parties. Within the zone prescribed by the terms of the act of 1873 there was an unfettered field wherein the right of contract was unabridged. The claimant company and the Government within these limits stood upon an equality and the bargain consummated was subject in every way to the ordinary rules governing ordinary contracts. The claimant company accepted the mails and performed its part of the contract in the face of an express provision, directly made a part of the contract, in response to claimant's protest, and finally accepted the compensation fixed in the contract without further protest or objection. *Yazoo & Miss. Valley R. R. v. United States*, 50 C. Cls., 15.

A careful review of all the legislation pertaining to the administration of the Post Office Department, and particularly with respect to the transportation of the mails, discloses a legislative intent to refrain from denying a wide discretion to the Postmaster General in the matter of administrative detail. If Congress designed a fixed and determinate compensation to be paid upon the average mileage basis per annum there would have been no necessity to do more than provide the means of ascertaining the same and thereby limit the contracting authority of the Postmaster General. The various statutes upon this subject, as more pertinently observed by the Solicitor General, were clearly intended to fix a maximum compensation, fair in any event to the railroad company and of sufficient elasticity to protect the Government. The field of fair negotiation, except as expressly provided, was left open, and the railroad company was under no compulsion to accept the terms of a contract it believed to be onerous and unremunerative. (See cases cited in opinion of Chief Justice.) Having engaged to perform a service under the terms of a contract authorized by law and having performed said service and accepted the full compensation agreed upon by the parties, it is difficult to perceive upon what authority a suit for increased compensation can be predicated in view of the authorities cited in the *Chicago & Alton* case, 49 C. Cls., 520, 521.

The act of 1873 expressly precludes the possibility of preciseness in ascertaining compensation to be paid the railroad companies for the

transportation of Government mails. "The pay per mile per annum shall not exceed * * *. On routes carrying their whole length an average weight of mails per day * * * the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working days, not less than thirty * * *"

67 cretionary. The very terms used erect a flexible basis to meet changing conditions and varied circumstances. Thirty days was considered by Congress as the minimum of fairness in the ascertainment of an annual average. Can it be said that a long-continued departmental opinion that the period stated continues to bring to the railways a fair compensation ripens into an unchangeable law, absolutely concluding the department from meeting changed conditions and circumstances? Judge Barney has discussed this phase of the case, and with his discussion I unreservedly agree. I think the statute abounds with express and unambiguous terms which unmistakably repose a wide discretion in the Postmaster General a clear legislative intendment to do no more than prescribe such limitations as Congress deemed wise, leaving the Postmaster General free to act in all other respects.

BARNEY, Judge, concurring:

It has been said that wise men often change their opinions, and I wish to exemplify the fact that unwise men sometimes do the same thing. My views of the act of 1873 will be found expressed in the case of N. Y., N. H. & H. R. R. Co., decided February 25, 1918, 53 C. Cls. —.

I do not think it can be judicially said that by the terms of section 4002 R. S. any divisor was absolutely provided for. The Postmaster General was thereby directed to pay the railroads in proportion to the average weight of the mails carried, this average to be determined by weighing the same at least once every 4 years for not less than 90 working days. Of course this would imply some mathematical process which would involve some kind of a divisor. In any event the compensation paid should not exceed a definite sum named. This weighing, whether by the railroads as at first provided or under the supervision of the Postmaster General himself, was for his benefit alone and for the purpose of enabling him to exercise wise discretion in making contracts for the carriage of the mails. The details to be followed in the weighing in order to approximately obtain the average was entirely at the discretion and under the direction of the Postmaster General. It was for his information it was to be obtained, and it was for him alone to say how this was to be done. I can see why this long continued exercise of this discretion in a certain way should not be changed as to existing contracts because contracts are construed according to the intention of the parties to them when they were executed, and in this case these existing contracts were understood by both parties to have been executed in the light of the then existing method of obtaining average weights. But I do not see how a discretionary authority can ever be said to ripen

into law by continued usage. Presumably the Postmaster General for a succession of years obtained such average weight in a way he thought best adapted to do justice to the different classes of railroads carrying the mails. This discretion seemed to be implied in the law.

Circumstances mentioned and described in the opinion of the Chief Justice became materially changed, and what was perhaps at one time a proper exercise of this discretion became improper, and a later Postmaster General in the exercise of the same power of discretion obtained this average weight in another way. In both instances it was

68 a proper exercise of discretion which was once changed in effect, and can be changed again if reasonably within the statute so as to affect the future contracts for the carriage of the mails.

DOWNEY, Judge, concurring:

I concur fully in all that has been said by the Chief Justice in the opinion of the court. Perhaps a word more might be added with reference to the theory presented in those cases in which the railroad companies injected into their proposals to carry the mails "upon the conditions prescribed by law and the regulations of the department" an exception with reference to Order 412, that the subsequent delivery of mails to such railroad for transportation by the United States gave rise to a contract in which Order 412 was not embodied. The contention might have force if the transaction rested there. But it did not. The Postmaster General specifically declined to permit any exception as to Order 412 and insisted that the contract should be subject to all the regulations of the department, as in its terms it was, and if effect is to be given to subsequent action of either of the parties, as it undoubtedly must be, it is to be found in the voluntary acceptance by the railroad companies of the mails for transportation under these circumstances, after the specific refusal of the Postmaster General to modify terms, and which action can not be interpreted otherwise than as an acceptance of a contract which was subject to and in which were embodied all the regulations of the department applicable thereto. The service was performed under such a contract, compensation was paid and accepted thereunder, and it seems idle, now, because of an antecedent protest of an attempted but rejected modification of terms, to contend that the contract is something else than entered into or is in some respect no binding upon one party thereto. It is difficult to see any basis upon which, after having entered into a contract not tainted with fraud or duress, performed service thereunder and received compensation therefore in accordance with its terms, the court can now be asked to write and enforce a different contract. The equities of rule 412 are capable of demonstration, the inherent and unexhausted discretion of the Postmaster General is as evident as it was necessary, but in my judgment, while other and related matters are proper subjects of discussion, we have to do, in the last analysis, with a contract relation and must leave the parties where, by their contract, they have placed themselves.

HAY, Judge, concurring:

It would seem, and indeed is, a work of supererogation to add anything to the very able and exhaustive opinion of the Chief Justice in this case. In his opinion he has discussed clearly and with singular ability every phase of it. Although I am convinced of the soundness of the views therein expressed, I have deemed it not unwise to very briefly express my views on one branch of the case.

The plaintiffs, in these cases, seem to insist that while the Postmaster General was given discretion, under the law, to determine the manner in which their compensation for carrying the mails may be determined, yet that he, having once exercised that discretion, could not change the method so adopted. The above is a bald statement of their contention. The mere statement of it is its refutation.

69 It would be monstrous to say that an executive officer, clothed with discretion to do certain things, in exercising the discretion given him, is bound to continue to act in the method first adopted by him, no matter whether that method was equitable or inequitable, proper or improper, just or unjust to the parties affected.

The fact that it was a long-continued usage does not change the principle. If in the course of time, it is discovered that the usage adopted is unjust to one of the parties, surely it will not be denied that the executive officer, exercising the discretion conferred upon him by law, can change the method; certainly this must be so when the change is not made to affect any person with whom a contract is being carried out, but applies only to contracts to be made in the future.

The opinion of the Chief Justice fully discusses and covers all the points of the case and I heartily concur in his conclusions.

70

VI. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Eleventh day of March, A. D., 1918, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the Seaboard Air Line Railway Company, as aforesaid, is not entitled to recover and shall not recover any sum in this action of and from the defendants, the United States; and that the petition be and it hereby is dismissed.

BY THE COURT.

VII. *Claimant's Application for, and Allowance of, an Appeal to the Supreme Court.*

Claimant hereby prays an appeal to the United States Supreme Court from the judgment of this court, rendered on the 11th day of March 1918, dismissing the petition.

BENJ. CARTER,
Attorney for Claimant.

Filed May 6, 1918.

Ordered: That the above appeal be allowed as prayed for.
May 6, 1918.

BY THE COURT.

71

Court of Claims.

No. 32,852.

THE SEABOARD AIR LINE RAILWAY

vs.

THE UNITED STATES.

I, Sam'l A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact, conclusion of law and of the opinions of the Court; of the judgment of the Court; of the claimant's application for, and allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 8th day of May, A. D., 1918.

[Seal Court of Claims.]

SAM'L A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 26,585. Court of Claims. Term No. 132. The Seaboard Air Line Railway, appellant, vs. The United States. Filed June 12th, 1918. File No. 26,585.

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Supreme Court of the United States

OCTOBER TERM, 1919.

THE SEABOARD AIR LINE RAILWAY, Appellant, v. THE UNITED STATES, Appellee.	} No. 132.
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BRIEF FOR APPELLANT.

This is one of four appeals in this court calling in question the validity of a new divisor set up by the Postmaster-General in 1907 in the computation of average daily weights of mails carried on the railroads, which average weights were the basis of the carriers' compensation. The issues are those on which by an evenly divided court decisions of the Court of Claims adverse to the railroad companies were affirmed here in the cases of the *Chicago & Alton Railroad Co.* and the *Yazoo & Mississippi Valley Railroad Co.* 242 U. S. 621, 622. It is assumed that no statement of these issues is needed in this case other than necessarily will be made in the framing of the argument.

ASSIGNMENT OF ERRORS.

In the following particulars the action of the Court of Claims is hereby assigned as error:

(1) In not holding that acts of Congress approved March 3, 1873 (17 Stat. Ch. 231, p. 558), July 12, 1876 (19 Stat. Ch. 179, p. 79), July 17, 1878 (20 Stat. Ch. 259, p. 142), and March 3, 1905 (33 Stat. Ch. 1480,

pp. 1087, 1088), established a working-days divisor for the computation of average daily weights of mails carried.

(2) In not holding that the uniform practice of the Postmaster-General before 1907, under said antecedent acts of Congress, established a mail divisor for use in all cases and that this divisor was recognized and adopted by Congress in the act approved March 2, 1907 (34 Stat. Ch. 2513, p. 1212).

(3) In not holding that, regardless of everything antecedent thereto, said act of March 2, 1907, prescribed a working-days divisor, to the exclusion of all others, for future use in all cases in the determination of such weight-averages.

(4) In not awarding judgment to appellant for the amount of the additional compensation it would have received by use of the divisor ninety (90) instead of the divisor one hundred and five (105) in computing the average weights of mail.

(5) In dismissing the petition.

PROPOSITIONS OF LAW.

When a statute not clear on its face is to be interpreted courts will consult legislative reports and debates for expressions or indications of the intentions of the legislative body.

St. Louis, Iron Mountain & Southern Ry. Co. v. Craft, 237 U. S. 548.

Tap Line Railroad Cases, 234 U. S. 1 (27).

United States v. Delaware & Hudson Co. 213 U. S. 366.

N. Y., N. H. & H. R. R. Co. v. I. C. Com'n, 200 U. S. 361.

United States v. Freight Ass'n, 166 U. S. 290.

Alexander v. United States, 12 Wall. 177.

When a statute, in its administration, has constantly received one interpretation, which is not obnoxious to all sound reasoning, the courts will give that interpretation to a new law in which the old is reenacted or which assumes that it will remain in operation.

United States v. Midwest Oil Co. 236 U. S. 459.

United States v. Hermanos y Compania, 209 U. S. 337.

Copper Queen Mining Co. v. Arizona, 206 U. S. 474.

Falk v. United States, 204 U. S. 143.

Brown v. United States, 113 U. S. 568.

Upon performance for and acceptance by the United States of a service for which compensation is fixed by statute, it is bound for the payment of that exact compensation.

United States v. Andrews, 240 U. S. 90.

Glavey v. United States, 182 U. S. 595.

Jacksonville, etc. Railroad Co. v. United States, 118 U. S. 626.

Eastern R. R. Co. v. United States, 20 Ct. Cls. 23.

If there was no true authority for the discretion of an executive officer exercised on one subject, such action is invalid even though, by the use of a discretionary power actually vested in such officer on another subject, the same result could have been accomplished.

United States v. Barlow, 184 U. S. 123 (133).

Collins & Farwell v. United States, 34 Ct. Cls. 294.

United States v. Windom, 8 Mackey (D. C.) 54.

Haywood v. Quincy, 44 Ia. 385.

Mobile Insurance Co. v. Cleveland, 76 Ala. 321.

State v. Lutz, 136 Mo. 638.

State v. Porter, 139 Ind. 63.

State Board, etc. v. the People, 123 Ill. 227.

ARGUMENT.

In all of the three other cases coming to be heard with this case attorneys of record, and in some of them other counsel in the quality of *amicus curiae*, have filed voluminous and able briefs. It is the aim of counsel in this case, so far as possible, to avoid redundancy of argument. They therefore at the outset—having chosen as their special subjects others of the common questions—submit without argument the following propositions—in which they have the same confidence that has inspired the efforts of other counsel:

(1) The act of March 3, 1873, *sup.*, was drawn by the Postmaster-General and passed by Congress for the purpose of standardizing the railway mail pay and, in so doing, of making permanent—and therefore it did make permanent—a plan which had been pursued since 1867 in determining average daily weights of mail carried.

(2) This act on its face indicated a working-days divisor and a working-day average of weights. Any other divisor would have been out of keeping with its provisions.

(3) In 1876 there had been fixed and established, by the use of a working-days divisor and the application of the full rates of pay named in the act of 1873, the rate of the annual pay per mile of every railway mail route, and when Congress, by the act of July 12, 1876, *sup.*, reduced the "compensation" of the carriers" ten per centum per annum from the rates fixed and allowed," it recognized and adopted both of the components used in calculating the compensation.

(4) Such a recognition and adoption occurred again when the act of June 17, 1878, *sup.*, was passed and the compensation of each route, computed and fixed under the act of 1876, was reduced five per cent.

(5) The act of March 3, 1905, increasing from "thirty successive working days" to "ninety successive working days" the minimum period for weighing the mails, with no other change in the law, was a readoption of the divisor which invariably had been applied to the dividend of weights ascertained by the weighing.

(6) Definite rates of pay were named in the act of 1873 for the purpose of relieving the Postmaster-General of the ungrateful task he had had in negotiating or otherwise determining rates for each railroad company.

(7) If the act of 1873 be deemed to have given the Postmaster-General a discretion to pay less rates than those named in it, that discretion existed for the following three years only; the act of 1876 reducing by a named percentage the "pay fixed and allowed by the act of March 3, 1876," accepted as an unvariable datum, upon which it was to operate, the identical full rates by which that pay had been computed.

(8) The Postmaster-General uniformly, both before and since 1907, has contracted with the railroad companies for a six days' mail service as a full consideration for the compensation computed by him and if, in case of a seven days' service, the Sunday trains were discontinued no reduction of the compensation could be made on that account.

These subjects, with propositions which they necessarily involve, together with the history of the railway mail pay from early times, have received very studious consideration in a brief filed by appellant's counsel in the appeal of the Kansas City, Mexico & Orient Railway Co. (No. 232). It is convenient here to refer to

and commend that brief as showing clearly, at pages 32 to 38, that the act of 1873 was correctly construed when it was treated as fixing absolutely the rates of pay for service performed in full compliance with the terms and conditions named, and as demonstrating, at pages 43 to 48, that a working-days divisor was provided for a working-days service, and therefore for every other kind of service. Also it is desired here to emphasize as unanswerable the contention there made, at page 48, that whatever reasons, after twenty-eight years' trial, may have recommended to Congress the practice pursued under the act of 1873 in ascertaining average weights, that practice was adopted by the act of March 3, 1905.

If what the Postmaster-General did in 1907 in the matter of the divisor had been done in 1906, the foregoing propositions, with the elucidation they have received in the briefs of other counsel referred to, would seem sufficient to stamp that action as unlawful. But these cases are concerned with events of 1907. How *then* did the law stand—what were the duties and prerogatives of the Postmaster-General and what were the rights of the railroads—in that year when mail pay questions came again to the front? Here arises the chief subject which has been selected for argument in this brief.

Congress in the legislation of 1907 for the first time made the mail divisor a subject of deliberation and of direct decision; and it decreed, in the future service, a working-days divisor.

When in 1907, 1908, 1909 and 1910 the Postmaster-General computed the pay of a railway mail route, he was bound to do it in accordance with the act of March

2, 1907, the last mandate he had received from Congress; and it would seem axiomatic that when courts come to rule upon the legality of the action taken by him they will subject it to that statute as a test. On any essential point the Postmaster-General should—this court will—study to learn what that enactment means. If a clear expression is found in the text of the statute the inquiry will go no further. Where the statute is silent, or of uncertain meaning, the court will search elsewhere for guides which the law prescribes.

With all deference to the disputation which has filled so many pages of the earlier briefs and opinions in this controversy, it may be said that there is nothing esoteric—nothing to mystify the student—in the law of statute construction. As in interpreting a contract a court has the single aim of ascertaining the common intention of the parties, so, in interpreting a statute, a court cares to know one thing only, viz, the intention of the legislature. All else—all other canons of interpretation—are but detail of this cardinal rule.

“The intention is the vital part, the essence of the law, and the primary rule of contracts is to ascertain and give effect to that.” *Lewis's Sutherland on Statutory Construction*, 2d Ed. Sec. 363.

In Potter's *Dwarris on Statutes* the rule and its details are thus stated (Ch. 5, p. 125).

“The end interpretation aims at is to find out the intent of the statute, instrument or writer; to clear up the meaning of words if they are obscure; to ascertain their sense if they are ambiguous, and to determine the design where the words express it imperfectly.”

Dwarris quotes elaborate dissertations of Puffendorf, Grotius and other ancient doctors of the law to the like

effect. These writers, like Dwarris, set up the same test in regard to statutes and in regard to contracts, viz, the intention of the authors.

"The rules for construction of statutes are aids only to the discovery of the intention of the legislation, are not inflexible, and none are of such paramount importance as to defeat the intention when that clearly appears." *Trammell v. Victor Mfg. Co.* 102 S. C. 483, 487.

"The object in the construction of a statute is to ascertain and effectuate the intention of the legislature."

State v. Barnett, 173 N. C. 750.

Hazzard v. Gallucci, 89 Conn. 196.

State v. Missouri Pacific Ry. Co. 262 Mo. 720, 730.

Commercial Trust Co. v. Hudson County Board, 86 N. J. L. 424.

"The fundamental rule in the construction of a statute is that the legislative intention must prevail whenever that intention can be ascertained." *Brackett v. Chamberlain*, 115 Me. 335.

The Court of Claims has been at great pains to avoid learning what was the intention of the Fifty-ninth Congress regarding the mail divisor.

No candid person who chanced to sit in the galleries of the House during the last days of February and the first days of March, 1907, could fail to understand that the House, in establishing a scheme of mail pay for future operation, had considered the question of a mail divisor in all its bearings and had settled the question in favor of the working-days divisor.

Significance of the act of 1905.

The legislation of 1907 can better be understood and appraised if some consideration is first given to the steps by which the law of March 3, 1905, *sup.*, was enacted. There was a case of the adoption of an institution (mail divisor) by avowedly keeping hands off it.

In framing their appropriation bill in 1905 the House Committee on Postoffices and Post Roads made provision for a divisor which would include Sundays as well as working days; but this encountered parliamentary objection, as involving change of law and therefore being out of place in an appropriation bill, and the committee contented themselves with an extension of the weighing time from thirty-five days (thirty working days) to one hundred and five days (ninety working days), to which latter there was no serious objection in the House, and the parliamentary point was waived. The original provision was:

“That hereafter, before making the readjustment of pay for the transportation of mails on railroad routes, the Postmaster-General shall have the mails on such routes weighed, and the average per day ascertained for a period of not less than three consecutive months.”

The point of order being reserved against this by Mr. Mann, the chairman of the Committee, Mr. Overstreet, offered a substitute as below:

“That hereafter, before making the readjustment of pay for transportation of mails on railroad routes, the average weight shall be ascertained by the actual weighing of the mails for such a number of successive working days, not less than ninety, and at such times after June 30, 1905, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster-General may direct.”

Upon the reading of this new clause Mr. Overstreet said:

"In explanation of that proposition I will say that the language of the provision which I have just had read at the clerk's desk is identical with the existing law except the word "ninety" is used in place of the word "thirty" as the term or period for weighing the mail. I used the same language of the law as it now is, and has been for many years, in order that there could be no question of the constructions that have been made of the law."

Mr. Mann withdrew his point of order, the substitute provision was adopted as an amendment to the bill and so a period including ninety working days was established for obtaining aggregate weights to which, in the ascertainment of the average, the working-days divisor should apply (Cong. Rec. Vol. 39, pt. 2, p. 1744).

Novel feature of the legislation of 1907.

When the court, in ascertaining the purposes (and therefore the effect) of the act of 1907, inquires into the proceedings by which it was accomplished, it will observe, repeated many times on page after page, two words which, so far as the record shows, were never spoken before in either house of Congress in relation to average rates of mail, viz, "divide" and "divisor." Naturally the weight divisor *now* received especial and very thoughtful consideration. The occasion of these proceedings and the results were:

The House committee had put in its bill one paragraph containing these alternative provisions having the one object of retrenching mail pay; one to establish a new divisor of weights, which would have affected all mails, large and small alike, and one, which applied only to mails in excess of the average of five

thousand pounds per day (to be determined by the antecedent weighings provided for) reducing by percentages the rates of pay. The relative operation of the two expedients, as well as the history and the reasons for the working-days divisor, were fully explained to the House and then on three successive parliamentary issues the proposed change in the divisor was rejected. The parliamentary difficulty being removed by a special rule, a rate-reducing amendment was considered on its merits and was adopted.

Finally, on two issues going to the merits of the question, the House voted down a proposed new divisor.

The action of the House was peculiarly well-informed and deliberate and it settled all questions of policy involved.

The decisive character of this legislation will hardly be appreciated unless the legislative proceedings are reviewed in detail.

The bill of the House committee was accompanied by a report in three parts (House Report No. 7312, 59th Cong. 2d Sess.). The main report, speaking for the committee, contained in some eleven pages of print about two pages relating to four changes of law proposed "by way of reduction of compensation for the transportation by mail by railroads." Regarding the divisor the committee, after referring to conditions of 1873, said:

"In the judgment of the committee the constantly increasing practice of railroads to maintain daily service, including Sundays, has brought about a decided change from that which existed at the time the law was enacted in 1873."

The committee's plan was to use as a divisor the number of days on which the mails were weighed. Part 2 of the report was signed by a single member of the com-

mittee and it took the view that the divisor should include all days of the weighing period, notwithstanding that there might be no weighings on some of those days. It said:

"It is claimed that the Department by excluding Sunday in fixing compensation observed the 'commandment of rest.' It will hardly be contended that a construction of the statute which warrants the weighing of the mails on Sunday would at the same time exclude that day in the computation as to pay. I hardly think it fair to invoke the commandment of rest at the expense of the Government."

The views of five members, a minority of the committee, was presented in Part 3 of the report. This opposed any change whatever in the divisor. Speaking of postal routes on which the mails were carried every day in the week, it said:

"To protect them from being required, through the phrase 'average daily weight,' to accept one-seventh less than the six-day roads, the words 'working days' were incorporated into the original law; that is, the Sunday mails are counted in the Monday weights, and as if carried on Monday. The Department seems never to have found any intricacy or difficulty in administering the law as it stands, and no substantial result can be conceived to follow the adoption of the change other than an arbitrary reduction of 14 per cent affecting railroads performing the greatest service for the Government, and those only."

So it would seem the House had an ample text upon which to consider and determine how the average daily rates of mails should be determined. Added to these documents, however, was a long communication prepared less than two months before by the Second Assistant

Postmaster-General and forwarded to the chairman of the House committee giving the history of the railway mail pay and of the working-days divisor (including a Departmental announcement of a new divisor in 1884, which was abandoned by reason of an adverse ruling of the Attorney-General) and concluding as follows:

"In view of this condition of the service, the intention of the law as disclosed by the history of the subject and the practice and construction placed upon it by the executive officers who were charged with its execution, of the contemporaneous declaration that in this respect the law adopted the practice which existed before its passage, and of the long-continued and unbroken maintenance of this construction upon the highest legal authority, I have to submit that the average daily weight as ascertained by the existing practice of the Department is the correct one contemplated by the statute" [of 1873].

Very respectfully,
W. S. SHALLENBERGER,
Second Assistant Postmaster-General."
Cong. Rec. Ib. pp. 3350, 3351.

There was extensive debate during four days in which the divisor was considered from every point of view.

Before any action was taken on the above provision of the bill an amendment was offered as follows:

"*Provided*, That no part of this sum shall be expended in payment for transportation of the mails by railroad routes where the average weight of mails per day has been computed by the use of a divisor less than the whole number of days such mails have been weighed" (Present record, p. 22).

A point of order was made against this amendment on the ground that it changed existing law. The chairman sustained the point, observing:

"The existing law has received a construction by the officers charged with the duty of administering it, and that construction the Chair feels bound to follow. *The proposed amendment changes the existing law as construed by the proper officer by changing the divisor.*"

Upon appeal this ruling was sustained. Then another effort was made to change the existing law by an amendment as follows:

"Provided, That no part of this sum shall be expended in payment for transportation of the mails by railroad routes where the average weight of mails per day has been computed by the use of a divisor less than the whole number of working days such mails have been weighed; and,

"Provided further, That the words 'working days' shall be construed to mean days upon which work in the transportation of the mails by railroad routes is performed."

(Cong. Rec. *Ib.* pp. 3469, 3472).

This was more specific in that it directed that the term "working days" should be construed to mean transportation days. It was in effect the same as Order 412, as to those routes carrying the mails seven days a week, and the same as Order 165 (promulgated by the Department in March, 1907, and cancelled by Order 412 in June) as to those routes carrying the mails only six days a week. This went out on the same point of order and then the paragraph to which these amendments were added in the bill as reported by the committee was ruled out. Thus the House as a legislative body decided that the working-days divisor was established by law and refused to avail of an opportunity to change it.

The House then adopted an amendment offered by

the chairman of the committee, providing for readjustment and reducing compensation on certain routes, but making no change in respect of the system that had always been followed for ascertaining the average weights, and enacted the bill. The way had been prepared for this by a special rule adopted by the House saving it from the objection that it would change the existing law.

When the bill came up in the Senate an amendment identical with that first rejected by the House was adopted by the Senate without debate or explanation. In conference objection was made on the part of the House to this amendment and upon the recommendation of the conferees the Senate receded from the amendment. Both houses adopted the report of the conferees and the bill was passed with this amendment stricken out and containing the House committee's provision for a reduction of rates (Rec. p. 23).

A new divisor, now being written into the bill, was considered by the conferees and by the two Houses on its merits. Probably in previous votes most members of the House had given more thought to the justness and expediency of one divisor, as compared with another, than to the parliamentary questions involved. It is common knowledge that, when legislators are called on to sustain or to reverse a ruling of the presiding officer vital to the matter under consideration, rules oftentimes do not stand in the way if there is a very strong sentiment in favor of the action proposed. Still there was a difference in form between the action of the House taken in shaping the bill and its action taken when its complete bill came back from the Senate with amendments. There was no possible reason to say that the latter action did not speak the judgment of the House on the merits of the Senate amendment.

The most significant thing of all occurred when, on announcement of the Senate's action, the chairman of the House committee moved to send the bill to conference. Mr. Murdock, a member of the committee, who, as has been shown, had stoutly championed a change in the divisor, opposed this procedure and appealed to the House for a direct vote on the Senate (La Follette) amendment regarding the divisor. He said:

"As the bill left the House, after final action by the House, the railway mail pay was cut in the region of two and one-half to three millions of dollars. As the bill left the Senate, after final passage through the Senate last night, railway mail pay is cut about \$8,000,000. If you vote up the motion now to suspend the rules, I believe that every man here who votes for this motion made by the chairman of the Committee on Postoffices and Post Roads will vote to cut railway mail pay about \$3,000,000. If he votes down that motion and against that motion, he cuts off an opportunity to concur in the Senate amendment and cut railway mail pay about \$8,000,000. The issue is plain. I would like to see every member of the House on record on that issue. The railway mail pay, which is the biggest thing in this bill, and which is one of the biggest single items of expenditure in any government, has been under impeachment for thirty-three years. It has been condemned time after time by Postmasters-General, and its correction has been attempted by four different commissions, each commission ending in a dog fall. Now, this Congress has come up to the point of cutting down the railway mail pay. Are you going to side-step the opportunity or are you going to be courageous and cut it what ought to be cut? That is all I have to say."

By vote of the House on the same day the motion of Mr. Overstreet was agreed to (ayes 136, noes 46) and

the bill was sent to conference (Cong. Rec. Vol. 41, pt. 4, p. 4030, pt. 5, p. 4033).

Here was Armageddon. Here banners were raised and battle joined. And the hosts of the working-days divisor were the greater and prevailed against the hosts of the new divisor.

The Court of Claims has left this whole incident out of the finding (Rec. p. 23) and has used language which may well be taken to mean that nothing occurred between the passing of the bill by the Senate and the creation of a conference. "The bill was *then* sent to conference." (Italics ours.)

When a rule was brought into the House by which to save the rate-reducing provision from the parliamentary objection Mr. Overstreet, the chairman of the committee, was asked why the same thing was not done on behalf of the proposed new divisor. Mr. Overstreet replied that as "a practical man" he was arranging for the thing which the House apparently chose to do, omitting the thing to which the House was opposed (Cong. Rec. Vol. 41, pt. 4, pp. 3233, 3234).

Congress in 1907, as before, was the sole judge of the expediency and justness of any mail divisor. In 1907 it settled all questions of policy in favor of a working-days divisor. It decreed that this was the correct divisor to meet conditions of that time, including the modifications it had decided to make in the law.

Order 412 defied the law by making reductions of fifteen per cent where the law provided reductions of five per cent and reductions of ten per cent where none were provided.

Being items of one paragraph in the committee's bill, the provisions (1) for a new divisor and (2) reductions in the rate of pay for the larger mails naturally were considered by the House in the light of their correla-

tions. The chairman and other members of the committee explained that there was a difference of opinion in the committee, as well as among others having an understanding of the subject, between a change of the divisor and the establishment of new rates as methods of reducing the pay. It was pointed out that the amount to be retrenched by any change of the divisor could not be foretold with any approach to accuracy, and therefore some were of opinion that, whatever changes of conditions might occur to affect the reasonableness of the current pay, the better method would be to maintain always a constant divisor and make changes in the rates alone. In regard to the rates it was shown that the pay on some of the routes, carrying very large mails, ran to very large figures—much, it was supposed, above the demands of reasonable compensation—while the pay for the smaller mails was none too much, being almost insignificant in some cases cited. Mr. Murdock favored reductions both by rates and by divisor (Cong. Rec. Vol. 41, pt. 4, pp. 3124, 3127, 3140, 3141, 3143, 3233, 4030). As appears above, the bill as it passed the House operated a saving for the Government of about \$3,000,000. Mr. Murdock was for saving about \$8,000,000.

So the House considered and made its choice between three plans: (1) A new divisor, affecting the pay for all the mails, and a reduction of rates of pay for the larger mails. (2) A change in the divisor alone, affecting routes of large mails and small mails alike. (3) A reduction of rates alone in regard to the larger mails with no reduction as to the small mails. The House chose the latter of these three expedients, and in so doing definitively rejected the others.

The compensation computed and paid to the railroad companies in the four contract sections (1907, 1908,

1909, 1910) under Order 412 was about ten per cent less than would have been paid for the same aggregate weights of mail by the working-days divisor (Reports of Second Assistant Postmaster-General for 1907 to 1913 inc.). So, then, although Congress by the act of 1907 fixed the pay for the large mails at ninety-five per cent of what they would have received for the same weights of mail at the old rates (and did this in absolutely mandatory terms) the Postoffice Department actually has paid for the larger mails 85 per cent of those amounts.

Congress said: "*Hereafter the rates shall be * * * five per cent or less than the present rates,*" etc. The Postmaster-General makes the law to be "*Hereafter the rates on such routes shall be * * * fifteen per centum less than the present rates.*"

Equally shocking, of course, is the operation of Order 412 upon the small routes. Congress decided that the pay of those should remain as it was. Yet the Department has taken away ten per cent of that pay.

The Pertinence of the Congressional Documents, Debates, etc.

In this review of the legislative incidents of 1907 it has been assumed that the law which resulted did not on its face dictate the use of other than the working-days divisor. Government counsel, it is believed, will not contend here for any more than that, in relation to the divisor, each of these laws is ambiguous. Surely it can not be contended with any sort of reason that the act of 1907 could have been administered, or now can be construed by this court, without looking beyond its four corners to learn what method, by the intention of Congress, was to be employed in ascertaining average daily weights of mail.

When a statute not clear on its face is to be interpreted, the rule of the law (which is nothing else than the rule of common sense) is that the proceedings by which the legislation was accomplished will be consulted for whatever light they may throw on the purposes (not indeed of individual legislators but of the legislative chamber as a corporate whole) by which the choice of words and phrases was dictated. Here it is a privilege to avail of what has been said in the brief filed by counsel for appellant in one of the other cases in the present group, the Northern Pacific Railroad Co.'s, appeal number 109 (pp. 41, 43, 44, 49, 50, 51).

A specially interesting point made in the Northern Pacific brief (the Court of Claims to the contrary notwithstanding) is that the intention of the law may be gathered from what the legislators refused to put in it as well as what they did put in it. *Alexander v. The United States*, 19 Wall. 177 is cited. The more recent case of the *United States v. Delaware & Hudson Co.* 213 U. S. 366, is to the same effect. The opinion in that case, written by the present Chief Justice, says:

"Certain it is, however, that in the legislative progress of the clause in the Senate, where the clause originated, an amendment in specific terms, causing the clause to embrace stock ownership, was rejected, and immediately upon such rejection an amendment, expressly declaring that interest direct or indirect, was intended, among other things, to embrace the prohibition of carrying a commodity manufactured, mined, produced or owned by a corporation in which a railroad company was interested as a stockholder, was also rejected (1906, 40 Cong. Rec. pt. 7, pp. 7012-7014). And the considerations just stated we think completely dispose of the contention that stock-ownership must have been in the mind of Congress, and therefore

must be treated as though embraced within the evil intended to be remedied, since it can not in reason be assumed that there is a duty to extend the meaning of a statute beyond its legal sense upon the theory that a provision which was expressly excluded was intended to be included. If it be that *the mind of Congress was fixed* on the transportation by a carrier of any commodity produced by a corporation in which the carrier held stock, then we think the failure to provide such a contingency in express language gives rise to the implication that it was not the purpose to include it." (*Italics ours.*)

The cases of the "tap line" railroads, still later than the *Delaware & Hudson* case, reported in 634 U. S., should put a quietus on all quibbling regarding the pertinence of debates (not to say committee reports or other documents) to the interpretation of the law enacted. There the court in a very summary way said (p. 27): "The debates, which may be resorted to for the purpose of ascertaining the situation which prompted this legislation, show," etc.; and from these debates the court drew the conclusion that Congress, as against the broad inhibition expressed in the statute, meant to give to the class of railroads in question the rights contended for in the suit.

For obvious reasons the courts, when seeking the meaning of statutes, do not concern themselves with the motives which determined the votes of individual legislators—only those things will be considered which are regarded as speaking for the legislative body as a whole. But this corporate action ~~may~~ will turn upon information obtained in the debates; and it is for this reason the debates, failing other lights, are sometimes consulted by the courts. In the present case the House learned through the debates that in 1884 the Attorney-

General had ruled that any other than a working-days divisor was inconsistent with the law; that the Second Assistant Postmaster-General then (1907) was of opinion that the average daily weight obtained by the working-days divisor was "the correct one contemplated by the statute" [of 1873]; that at the prevailing rates of pay some postal routes in the thickly settled States were receiving pay of from eighty thousand dollars to near two million dollars per annum; that the proposed change of rates would reduce the pay to the railroads at large about \$3,000,000 per year, while a change of the divisor might operate a reduction of from four million to six million per year—nobody being able to make any close estimate (Cong. Rec. Vol. 41, pt. 4, p. 3234). The influence upon the House as a whole of these facts, supplementing the report of the committee and the explanatory statement made by its chairman, produced a conviction that the working-days divisor, and none other, ought to apply in future years in connection with the new rates then established.

The Effect of Administrative Interpretation of an Earlier Statute in Pari Materia.

If the Congressional deliberations of 1907 had been confined to the question of rates of pay per pound—if nothing had been proposed or, in any authoritative way, said in relation to the divisor of weights—then the statute which resulted necessarily would have taken that interpretation upon which the act of 1873 had been applied.

The Court of Claims again—for what reason is not quite clear—concerns itself with *United States v. Hermanos y Compania*, 209 U. S. 337. Nothing else can be made of that case by any ingenuity than (1) that

seven justices of this court deemed the Government's contention to be correct both upon the bare terms of the statute in question and upon the interpretation which constantly had been given to the statute in its administration during some nine years, and (2) that the two remaining Justices (the present Chief Justice and Mr. Justice Peckham) had some different view regarding the interpretation of the act by first impression but concurred with the main opinion on the other point. How the two justices could more forcefully have stated the controlling effect in such a case of an administrative interpretation, is hard to conceive.

The comparatively recent case of the *United States v. Midwest Oil Co.*, 236 U. S. 459, seems especially worthy of analysis and comparison with the case now at bar. The matter at issue there was the validity of orders issued by the President of the United States, without specific authority of law, withdrawing public lands from sale. The court, in an opinion by Mr. Justice Lamar, said:

"We need not consider whether, as an original question, the President could have withdrawn from private acquisition what Congress had made free and open to occupation and purchase. The case can be determined on other grounds and in the light of legal consequences flowing from a long-continued practice to make orders like the one here involved. For the President's proclamation of September 27, 1909, is by no means the first instance in which the executive, by a special order, had withdrawn land which Congress by general statute had thrown open to acquisition by citizens. And while it is not known when the first of these orders was made, it is certain that 'the practice dates from an early period in the history of the Government' (*Grisar v. McDowell*, 6 Wall. 381). Scores and hundreds of these orders have been made, and treating them as they must be (*Wolsey v. Chapman*, 101 U. S. 769),

as the act of the President, an examination of official publications will show that (excluding those made by virtue of special Congressional action (*Donnelly v. United States*, 228 U. S. 255), he has during the past 80 years, without express statutory authority—but under the claim of power so to do—made a multitude of executive orders which operated to withdraw public land that would otherwise have been open to private acquisition.”

On consideration of this opinion it will be found that there were less imperative reasons by far in that case than in the case here presented for looking to the antecedent administrative practice for the interpretation of the law:

(1) The President's action relative to the lands was not part of the law under which lands were sold. On the contrary its effect was to abridge that law. What the Postmaster-General did, in the matter of the mail averages, *was* a necessary function in the administration of the act of 1873 and subsequent laws.

(2) Although the President's withdrawals of land from sale were not infrequent, they were, in the proper sense of the word, occasional merely; they did not attach to every section or township or even every large body of lands open to entry and sale. The Postmaster-General's computation of average weights of mail occurred every year in one or another of the four contract sections. For this reason, and the one above, Congress could not escape knowing the method by which the computations were made at the Postoffice Department; whereas it was only by some accident Congress was informed of the President's withdrawals of land.

(3) The statute finally enacted regarding land-withdrawals was not precisely what the President, when issuing his proclamations, had expected. On the other

hand, the necessary effect—and the purpose, as well—of the legislation of 1907 was to continue the use of the mail-divisor which had always obtained. Moreover, when Congress again, viz, in 1908, was asked to legislate upon the divisor, it refused to authorize a departure from the old divisor in the contract sections where the four-years contracts had not expired (Cong. Rec. Vol. 42, p. 3221).

(4) The subject of the President's proclamations regarding the lands was not the same throughout the whole period reviewed. It was not until a comparatively recent date that such withdrawals of *mineral* lands had been made. In the matter of the mail weights there had been but one subject of action all those years. For some forty years before 1907 the Postmaster-General had precisely the same thing to do each year, to wit, to obtain from the aggregate weights of the weighing period an average weight *per diem*.

It will be observed, moreover, that the three dissenting justices, as well as the majority of the court, in searching for the true significance and effect of the land-withdrawal statute before them, carefully considered proceedings in Congress of which it was the result.

The three dissenting justices also, in their very exhaustive opinion, recognized to its full extent the definitive significance of a continuous executive interpretation of a statute. It is observed in that opinion that Congress had provided for withdrawal of lands from entry in two cases, and that the past withdrawals sustained by the court "it is believed would be found in one or the other categories above stated" (p. 392). Further on it is said (p. 405):

"The authority which may arise by implication, we think, must be limited to those purposes which Congress has itself recognized by either direct legis-

lation or *long-continued acquiescence* as public purposes for which such withdrawals could be made by the Executive. * * * We are unable to find sanction for the action here taken in withdrawing a large part of the public domain from the operation of the public land laws in the power inherent in this office as created and defined by the Constitution or in any way conferred upon him by the legislation of Congress or in that *long acquiescence sanctioned by Congress* in such manner as to be equivalent to it. (Italics ours).

In *Copper Queen Mining Co. v. Arizona Board*, 206 U. S. 474, there was to be construed a statute which, first enacted by the legislative assembly of Arizona in 1887, was reenacted, by codification alone, in 1901. It was copied from a Colorado statute. Before the original legislation of Arizona the Colorado statute had been construed a single time in one way by the Supreme Court of that State, and the Arizona statute, during the four years preceding its codification, had been construed in the opposite sense by the Equalization Board of that territory, charged with its administration; and the ~~Supreme~~ Court held that the latter construction must govern; the court observing that the law having been reenacted by the Arizona codification, "it may be presumed that the construction is satisfactory to the legislature unless plainly erroneous, since otherwise naturally the words would have been changed."

Discretion of the Postmaster-General.

Broad assent has been given above to the proposition of other counsel that since 1876 rates and other constituents of the railway mail pay have been fixed beyond all control of the Postmaster-General. It is desired here to add a few words regarding the unique episode of 1884

in which the Postmaster-General received some very definite advice in this connection.

By the publishing of an order to make the divisor include all days of the weighing, and the submitting of this to the Attorney-General (Rec. pp. 18-20), two questions in effect were raised: (1) Was the divisor a matter of the Postmaster-General's discretion; and (2), if not, what divisor did the law prescribe? The reply (to both questions) was that any other than the working-days divisor would "defeat the intention of the law." If one thing was required by the law, the Postmaster-General manifestly had no discretion to set up something else in its stead.

If a belief in a discretion of the Postmaster-General really was entertained at the Department momentarily in 1884, it is clear enough that no such idea found lodgment there at any other time before March 2, 1907. The most that can be said is that at one time, in 1878, there was some thought of giving the Postmaster-General very large discretion over the railroad mail pay. It was suggested that the *quantum* of the service performed by the railroads would be measured better by the space occupied in the cars than by the weight of the mails, and that the Postmaster-General should have power to say what car space should be assumed in the pay-computation for any given weight of mails carried and a bill to that effect was introduced in Congress. Of that proposal the Postmaster-General himself, in his report for 1878, said:

"The passage of the act, fixing certain rates per linear foot per mile, according to the speed of the trains, etc., without prescribing a gauge expressly limiting the amount of space to be required in each case, would leave the amount of space to be used and paid for to the discretion of the Postmaster-

General; this would leave to his judgment the rates to be paid for conveying the mails on 77,000 miles of railroad. Argument to show that this should not be done is unnecessary."

That Congress fully shared the views of the Postmaster-General, is shown by the legislation, in the Post-office appropriation act approved March 3, 1879, which followed on his recommendation (20 Stat. L. Ch. 180, p. 358). There the Postmaster-General was directed to ascertain as well as he could the cost and proper compensation for mail transportation, and this was added:

"He shall, in his annual report to Congress, *make such recommendations* founded on the information obtained under this section, as shall, in his opinion be just and equitable." (Italics ours.)

So lately as in his report for 1905 the Postmaster-General told in some detail of the progress made in enlarging and improving the railway mail system, and he explained what advantages his Department could obtain, and what it could not obtain, through competition of the railroad companies. He said (p. 20):

"The wide extension of the railway systems of the country and the very active competition between them have made the competition very much more active; hence it is that while the Department does not secure lower rates of compensation it secures better service and larger amounts of service by its fixed rule to give all through mails to the road which renders the best service and quickest delivery. As between the trunk lines this often means a full train of postal cars scheduled to meet the needs of the Department. * * *

"Wherever competition is possible, the Department, being unable to secure a lower rate of pay, uses the volume of mail to be dispatched to secure better service. Hence, where several competing

lines between terminal points plead for an equitable division of through mail, the policy of this office is to deny the request and give the mail to that road which will permanently schedule and maintain the best train service."

When an agent, entirely free, embarks upon a large project, he himself fixes the conditions and terms of the work and then submits the project to competitive bidding as to the *price*. Naturally the Postmaster-General would have awakened competition with respect to the prices he must pay for railway mail service if so much as a suspicion had been entertained by him and his advisers that this was permitted by law. Knowing that this was not permitted, he sought to avail of railroad competition the other way round, by stimulating each competing railroad company to offer the best *service* it could perform.

Counsel for the Government in the proceedings have referred, and the court in its present opinion refers to various statutes enacted in the years 1813, 1815, 1838, 1839 and 1845, by which authority was given specifically to the Postmaster-General to have the mails carried on steamboats, to establish the mail service on railroads, and to classify the railroad routes with the view to an equitable adjustment of pay.

The first thought that suggests itself in this connection is that these grants of power to the Postmaster-General presupposed that he did not have inherently any broad, indefinite authority over the same subject-matters, and that, from these statutes, he derived no powers except those stated. This latter end the statutes guarded in part by express limitations against an increase of expense through the use of the improved methods of carrying, by the requirement of public advertisement in the letting of contracts, by the specific

fixing of the bonus that might be allowed for night service on the railroads, etc.

No better statement, for the present purpose, of the functions and powers of the Postmaster-General could be desired than is afforded in *United States v. McDaniel*, 7 Pet. 1, 13:

“A practical knowledge of the action of any one of the great departments of the Government must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done that can neither be anticipated nor defined, and which are essential to the proper action of the Government.”

Surely the fixing of pay for the railway mail service is not among the “minute movements” of the Postoffice Department; it is rather among the “great outlines,” constantly controlled by Congress.

The novel thing in the act of 1873 was that it (and, as we have said, upon the motion of the Postoffice Department) specified the rates of compensation that were to be paid for the railway mail service, this function, during the experimental stages, having been entrusted to the Postmaster-General within the limits to which we have referred; and now the fact that stands out in all the legislation which commenced in 1873 is

that the fixing of the pay for the railway mail service is one thing that Congress has kept rigidly in its own hands.

In the *Delaware, Lackawanna & Western Railroad Co. v. United States*, decided on April 14, 1919, and not yet officially reported, this court held that since the findings did not import that the railroad company had a contract for any fixed period of time, the Postmaster-General seemed to have power to apply forthwith the reduced rates (in excess of five thousand pounds) which the act of 1907 provided. This was very, very far from saying that, mid-way of a contract period or at its commencement, the Postmaster-General could fix a rate or any other factor in the mail pay which he had evolved from his own sense of justice and expediency.

The Railroad Companies are Not Estopped.

Upon the assumption that the Postmaster-General's Order 412 was lawful, and therefore a part of the contract, (Rec. p. 59), the Court of Claims concludes its opinion with an argument that because the railroad companies performed the service after this order was promulgated they are estopped to complain of it. As regards railroads not land-aided a second assumption in the argument is, of course, that the railroad companies had their option to carry or not to carry the mails. By way of general comment on numerous cases cited in the opinion (pp. 59-61), it may be said that there is no case in any of the reports which holds that there is no legal obligation on a railroad company having no land-aid to carry the mails when called on by the postal authorities to do so. That precise question has never been presented for decision. What has been decided, in varying circumstances, is that there is no obligation to perform the service at the particular rates, or on some particular conditions, prescribed by the Postmaster-General.

A number of cases cited by the Court of Claims have to do with performance of work without protest for more than eight hours in cases where there was an eight-hour law which the public officer in authority, being vested by the law with a discretion, had never put into effect. The irrelevance to this case is obvious.

There are some cases in this court and more still in the Court of Claims to the effect that a railroad company operating trains on track belonging to another company, which latter has a contract for carrying the mails, can not be compelled to perform mail service, and when of its choice it becomes a "lap" route for such service it is bound to the rates named by the Postmaster-General (*Philadelphia & Baltimore Central Ry. Co. v. United States*, 103 U. S. 703; *Texas & Pacific Ry. Co. v. United States*, 28 Ct. Cls. 379. Probably it never was asserted that a railroad company is under any obligation to do anything whatsoever in relation to track (not its own) where it was under no duty to operate trains.

Eastern Railroad Company v. United States, 129 U. S. 391, also cited in this opinion, decided merely (1) that the railroad company had contracted, by implication, to carry the mails for reasonable compensation within a maximum fixed by Congress and (2) that, having acquiesced for a long time in new rates fixed, it could not then be heard to say they were not reasonable.

It may well be contended that in virtue of the acts of Congress of July 7, 1838 (5 Stat. 283), and March 3, 1845 (Ib. 738), making all railroads postal routes and directing the Postmaster-General to inaugurate mail service thereon, the Government has the power in some way to compel the carriage of the mails on any and all railroads. If other means fail, the Government, obviously might take possession of and operate the trains for the purpose of hauling the mails. This, however,

seems immaterial. When the Seaboard Air Line Railway on and following July 1, 1908, and 1909, respectively, received and transported the mails it did so because practically there was no escape from so doing. Postoffice cars, under previous arrangements with the Department, were running on its tracks. The Government's agents in the main brought the mails to those cars and received them therefrom, the employees of the railroad companies having no hand in the loading and unloading. Employees of the railroad company were not permitted to enter the postoffice cars for any other purpose than to operate the train (Postal Laws and Regulations of 1902, Sec. 1449). Therefore to hold that a railroad company could have avoided carrying the mails is to say that it had a right to put its employees forcibly into the postoffice cars and throw the mails therefrom—this at the risk, at least, of a riot with the postal agents. No such thing, it is submitted, can be required of any citizen for the protection of his rights.

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JAMES F. WRIGHT,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE SEABOARD AIR LINE RAILWAY, Appellant, v. THE UNITED STATES.	} No. 132.
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THE NEW YORK CENTRAL & HUDSON River Railroad Company, Appellant, v. THE UNITED STATES.	} No. 133.
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KANSAS CITY, MEXICO & ORIENT RAIL- way Company of Texas, Appellant, v. THE UNITED STATES.	} No. 232.
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APPEALS FROM THE COURT OF CLAIMS.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General, on behalf of the United States, and respectfully moves the court to advance the above-entitled cases for hearing on the same day as *Northern Pacific Railway Company, Appellant, v. The United States*, No. 109 on the docket for the present term.

These four cases are known as the Divisor Cases and involve the question of the method to be employed in determining claimants' compensation for transporting the mails. The cases are substantially similar to the cases of *Chicago & Alton Railroad Co. v. United States* and the *Yazoo & Mississippi Valley Railroad Co. v. United States*, argued to this court at the 1914 term and reargued at the 1916 term and affirmed without opinion by an equally divided court. (242 U. S. 621.)

While the cases present somewhat different questions, some of the appellant carriers being land-grant roads and others not, the cases are all of the same general character, and as stated in its opinion were heard together in the Court of Claims (53 Ct. Clms. 258, 272). It is therefore respectfully suggested that the convenience of the court may be served by a setting of the cases for hearing on the same day.

Counsel for the appellants in the several cases have been notified of this motion and state that they have no objection to the setting of the cases for hearing on the same day, provided they are afforded full time for the presentation of their respective cases.

ALEX. C. KING,
Solicitor General.

OCTOBER, 1919.





In the Supreme Court of the United States.

OCTOBER TERM, 1919.

SEABOARD AIR LINE RAILWAY, APPELLANT,	} No. 132.
v.	
THE UNITED STATES.	

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is one of the Divisor Cases mentioned in the Government brief filed in Nos. 133 and 232. The facts are slightly different from the facts in those cases; but do not alter the questions raised and discussed therein.

This brief is filed to state the issues in this particular case and to notice such matters as may not be covered by the briefs filed in the other divisor cases.

Claimant is a corporation organized under the laws of the State of Virginia. It operates, and for a time prior to July 1, 1907, had operated a system of railways in the States of Virginia, North Carolina, South Carolina, Georgia, Florida, and Alabama, over

which it has transported the mails under contracts with the Postmaster General on thirty routes established by him. An enumeration is contained in Findings of Fact I, Record, page 13. It is not deemed important.

In the construction of four of these lines of railroad the plaintiff was aided by grant of lands made thereto by the United States, and was not aided by any grant by the United States in the other twenty-six routes.

On twenty of these routes mail is carried every day. The other ten are so-called "six-day routes."

For the service performed by plaintiff on the routes involved in its claim known as "six-day" routes, the aggregate annual pay during the period July 1, 1908, to June 30, 1912, was \$7,286.86, and during the period July 1, 1912, to June 30, 1916, \$7,381.45.

For the service on the seven-day routes (other than route 114025) during the period of July 1, 1908, to June 30, 1912, the aggregate annual pay was \$383,769.09, and \$485,647.09 during the period from July 1, 1912, to June 30, 1916. On said seven-day route No. 114025 the annual pay was \$16,883.52 during the period from July 1, 1908, to June 30, 1909, and \$42,983.07 during the period from July 1, 1909, to June 30, 1912. (Finding II, R. 14.)

The arrangements under which claimant had been transporting the mail on certain of the routes served

by it were to expire on June 30, 1908. In January, 1908, the Postmaster General wrote to the claimant stating his intention to conduct the usual quadrennial weighing of the mails carried upon those routes "for the purpose of obtaining data upon which the department may adjust the pay for mail service on the route (in accordance with the several acts of Congress governing the same) from July 1, 1908." (Finding XI.)

These statutes were the act of March 3, 1873 (Rev. Stat., sec. 4002), as amended or affected by the acts of March 3, 1875 (18 Stat. 341), July 12, 1878 (19 Stat. 79), June 17, 1878 (20 Stat. 142), March 3, 1905 (33 Stat. 1088), and March 2, 1907 (34 Stat. 1212). These statutes are set out and discussed in the *New York Central* case.

The Postmaster General's letter specially called attention to Order No. 412, which was quoted, and stated that the whole number of days included in the weighing period would be taken as a divisor. The Postmaster General sent to claimant, as was also customary, a "distance circular," to be filled out and returned for the purpose of giving certain information not here material. The circular contained what is sometimes called an agreement clause, which read:

The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the Department, applicable to railroad mail service.

Said Order 412, which was a modification of Order 165 made in March, had been issued on June 7, 1907. It reads:

Order No. 412.—Ordered that Order 165, dated March 2, 1907, be, and the same is hereby, amended to read as follows:

“That when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day.”

On May 25, 1908, the claimant returned the distance circular above referred to duly signed, and in the following year it executed and returned a like distance circular which was sent it for a route upon which the quadrennial period expired June 30, 1909.

The Postmaster General caused the average daily weight of mail carried by the claimant on the foregoing routes to be calculated as provided in Order No. 412. On the basis of this calculation he stated, by an order of which notice was given the claimant, the pay which the claimant would receive upon the routes served by it. The claimant thereafter carried the mails over these routes and received the compensation stated by the Postmaster General.

The same forms of distance circulars were sent the claimant for the routes where an adjustment of pay was to be made for the term beginning July 1, 1912.

The claimant returned the distance circulars with a typewritten agreement clause substituted for that printed. It read:

The company named below agrees to accept and perform mail service upon the conditions prescribed by valid and existing laws, and valid regulations of the Post Office Department, applicable to railroad mail service made in conformity therewith. (Finding XI, R. 26.)

The reply of the Department dated June 20, 1912, was as follows:

In regard to the statements contained in the typewritten form of agreement and acceptance substituted by your company for the agreement clause of the circular, and in reply thereto, I have to inform you that, notwithstanding the same, the Post Office Department will not enter into contract with any railroad company by which it may be excepted from the operation or effect of any postal law, regulation, or order of the Postmaster General; and it must be understood that, in the performance of service, from the beginning of the contract term above named and during the continuance of such performance of service, your company will be subject, as in the past, to all the postal laws, regulations, and orders of the Postmaster General which are now or may become applicable during the term of this service, and to usual customs and practices in relation to railroad mail service, and that no other or further compensation for such service performed will be paid than that fixed by the orders of the Postmaster General.

No reply appears to have been made by the claimant to this letter.

An order dated September 19, 1912, fixed at certain figures the compensation which the claimant would be paid for carrying the United States mails over the routes which it served. The claimant continued to carry the mails as offered to it and it received without protest payments as stated in the orders of the Postmaster General.

The petition herein was filed June 27, 1914. A total recovery exceeding \$200,000 is asked.

ARGUMENT.

I.

The canons of construction contended for by appellant have no application, for the reason that there is no ambiguity in the statutes.

The appellant in this case has adopted on the main points the briefs of counsel in the other cases (App. Br. pp. 4, 5, 6, 20). The discussion in its brief is confined mainly to the congressional history of the acts of March 3, 1905 (33 Stat. 1088) and of March 2, 1907 (34 Stat. 1212), and its significance in construing said acts.

Following the course of the appellant the Government relies on its briefs filed in the other Divisor Cases (Nos. 109, 133, 232) in reply to the several propositions stated in appellant's brief pages four and five.

As to the propositions of law advanced on pages two and three, we say:

That in cases to which such principles are applicable the doctrine that legislative reports and debates

may be consulted as aids to construction to the limited extent laid down in the decisions is not disputed.

It is, however, denied that any ambiguity exists in any statute here involved or any need for construction.

It is also insisted that the legislative history supports the obvious meaning of the statutes and confirms the conference upon the Postmaster General of a continuing discretion in the matters of method of ascertaining weights, subject to the minimum requirements prescribed, and the fixing of compensation, not exceeding the maximum rates.

The interpretative value of a course of administrative action is not disputed where the meaning of an act is doubtful.

But here it is denied that any such doubtful meaning exists and further that the course of action does not establish any other construction of the statutes save the existence of the continuing power of the Postmaster General to exercise his discretion within the limits, minimum and maximum, fixed by the statutes.

Again, we appeal to the fact that from 1907 the administrative interpretation has affirmed the discretion of the Postmaster General to adopt the method of mail weighing now pursued, and that Congress has made its appropriations on the estimates of the Postmaster General reported as made on this basis, and there has been no legislative direction to change the method.

It is submitted that citations to the point that the United States is bound for the compensation attached to an office where fixed by statute are not applicable to these cases.

Here the railroads were contracting for the carriage of the mails. They had no right, by election or otherwise, to carry them. They contracted to take them at a stated sum and this measured their compensation.

The plaintiff's contention would establish the point that if there were two parallel railroads and one offered to take the mails at a lower price than the other—being less than the maximum price allowed—the Postmaster General would have no right to accept the better bid but must pay the maximum price for the service.

The last proposition of law that an action had under one claim of discretion can not be sustained because by invoking a valid discretion on another subject the same result would be attained, even if conceded, is wholly inapplicable here. The thing to be done by the Postmaster General was to readjust and fix compensation for carrying the mails; to do this he had to ascertain average daily weights and fix a fair and reasonable compensation, not exceeding certain rates. (Rev. Stat., sec. 3999.)

It is not disputed that he took and had the weights for the 90 secular working days; also the actual weights for Sundays. The division by 90 or 105 was a mere matter of mathematics.

He knew if the statute required him to use 90 days as a divisor and he divided his 105 days' weights by 90 the quotient would be, in fact, an average of $1\frac{1}{2}$ days' weights. He might well say, "I will only pay the maximum rate if I use the 105-day divisor. The statute says the minimum number of days I shall weigh; it says nothing beyond this of how I shall proceed to ascertain average weight, or what compensation, not exceeding certain rates, I shall allow."

In saying to the railroads "in applying maximum rates I shall use the divisor stated in Order No. 412," he was fixing a compensation identical with what would result if he had said "I shall use the old divisor 90 but I will use six-sevenths of the maximum rate in fixing compensation."

The discretion is really, in the reaching proper compensation, of applying what he deems a fair and reasonable rate (within the maximum) to his average daily weight. If the maximum rate was in his opinion excessive when applied to an average really one-seventh too much, he would not pay it. It was immaterial which side of his multiplication sum he reduced, unless he was tied both as to a divisor and a rate of pay.

II.

Appellant's statement and deduction from the legislative history of these statutes is incorrect.

It is incorrect to say that Congress in the legislation of 1907 for the first time made the mail divisor system a subject of deliberation and direct decision and decreed in future service a working day divisor.

This statement concedes that the act of 1905 did not change the act of 1873 in any respect except by substituting 90 days for 30 days in said act.

It also shows that any failure to adopt a change of divisor was due to a point of order that such change could not be made by amendment to an appropriation bill over a point of order that it was different legislation. It therefore is without significance on the subject here involved.

It is incorrect to say that on two issues going to the merits of the question the House voted down a new proposed divisor. The thing actually voted down was an attempt to tack on to an appropriation bill a proposition to alter the discretionary method of 1873, by inserting a mandatory divisor, when it had been ruled out of order as improper legislation in such bill. For a full history of this legislation and a further reply to the rest of appellant's brief, the brief for the appellee in Nos. 133 and 234, is here submitted. Such brief and that in No. 109 are also relied on and respectfully here submitted on all points herein set up.

No notice has been taken in appellant's brief of the fact that appellant is as to a small part of its lines a land-grant road. It has, therefore, not been thought necessary to discuss this phase here. Reference on the subject, however, is made to the appellee's brief in *Northern Pacific R. R. Co. v. United States*, No. 109.

III.

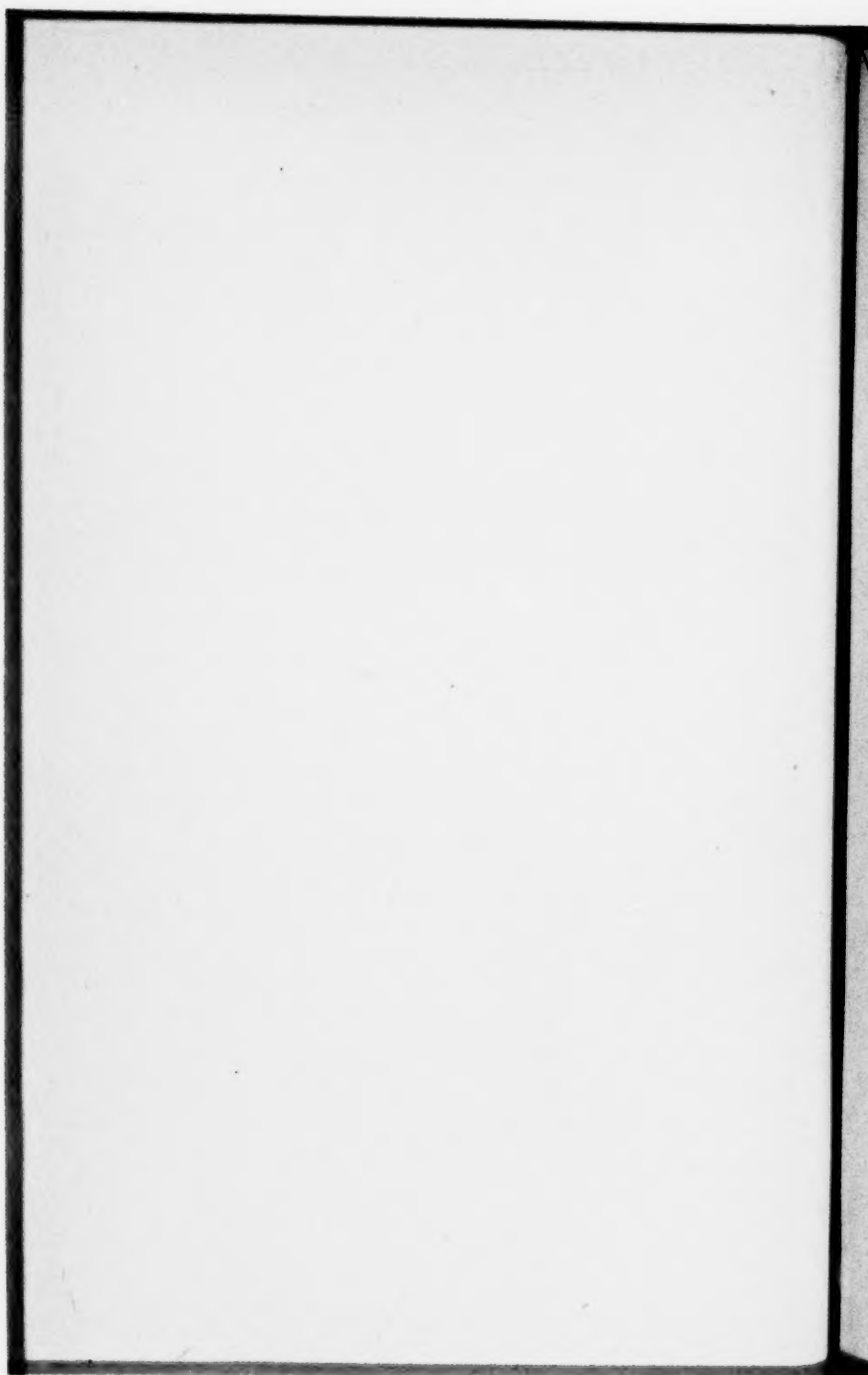
The appellant accepted the Postmaster General's notice that Order No. 412 would be used without objection and carried the mails and accepted the compensation.

Two mail weighings are here involved. In that of 1908, when the Postmaster General sent his distance circular and notified the railway that he would use Order No. 412 in weighing, they signed the agreement clause without any objection. The compensation was fixed and received without demur.

When the like circular and notice was sent out for the 1912 weighing, the only form of dissent was the return of the agreement clause signed but changed so as to agree to perform under the conditions prescribed by valid and existing laws and valid regulations of the department.

Although Order No. 412 was in the notice designated and quoted as the method of weighing to be used, no objection was made to it except as it might thereafter be claimed to be invalid.

But the Postmaster General replied, refusing to contract on the substituted agreement and insisting that all existing regulations (Order No. 412 having



Office Supreme Court, U. S.

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JAMES D. MAHER,
CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No 132

SEABOARD AIR LINE RAILWAY COMPANY,
Appellants,

vs.

THE UNITED STATES.

Appeal from the Court of Claims.

Brief, as *Amicus Curiae*, of Counsel for the Minneapolis,
St. Paul and Sault Sainte Marie Railway Company.

L. T. MICHENER,
Amicus Curiae.

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1919

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1911

SEABOARD AIR LINE RAILWAY COMPANY

Respondent

THE UNITED STATES

Appellant from the Circuit of Appeals

vs.
Seaboard Air Line Railway Company,
Respondent.

JOHN W. BAKER

Attorney for Appellant

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Supreme Court of the United States

October Term, 1919.

SEABOARD AIR LINE RAILWAY
COMPANY,

Appellant,

v.

THE UNITED STATES.

No. 132.

On Appeal From the Court of Claims.

BRIEF AS AMICUS CURIE, OF COUNSEL FOR THE MINNEAPOLIS, ST. PAUL AND SAULT SAINTE MARIE RAILWAY COMPANY.

On leave of Court granted, this brief is filed on behalf of the Minneapolis, St. Paul and Sault Sainte Marie Railway Company, it having now pending in the Court of Claims a case quite similar to the case at bar. The principal purpose of this brief is to discuss certain features of the case at bar, bearing on the contract relations between the Government and the railroads growing out of protests made by them against Order No. 412.

I.

Comments on Briefs.

1. Counsel for this appellant relies upon the refusal of Congress in 1907 to enact a new method of ascertaining average weights, as being equivalent to legislation fixing for the future the old method (which it was proposed to change) regardless of whether it had been right or wrong theretofore. This view of the law of the case is earnestly urged upon the Court by him, as it was in the Chicago & Alton case, in which a similar judgment of the Court of Claims was affirmed by an equally divided court (242 U. S. 621). We submit that counsel for appellant makes the most of his argument and demonstrates from the established facts that, if the principle of law he advocates be sound, this is plainly a case to which it must apply.

Other railroad counsel, including the undersigned, contend that the cases here are strong enough without depending upon anything but the construction manifestly proper from an analysis of the laws which were left unchanged, that is to say, upon what Congress did rather than what it did not do. The brief for appellant in the case of the Kansas City, Mexico & Orient Railway Company, No. 232, is typical of this school of thought, counsel in that case showing every evidence of holding the view, as we do, that in the construction of statutes the first recourse is to the statute itself. The simple analyses of the act of 1873 (R. S. 4002) made for appellant in that case, as we submit, show conclusively that the constructions which were contemporaneously and continuously given it by the department, both as fixing the rates of pay and as providing exclusively and mandatorily a working day

divisor in every case, were not only possible but the only possible ones (Brief, pp. 34-36; 47-48).

In discussing other terms of the act bearing perhaps less directly but almost as intimately upon the method of ascertaining averages the same conclusion is reached (pp. 49-51) and the argument is pursued to the point of eliminating any other divisor as possible under the act (pp. 51-53). The argument proceeds in entire independence of the fact that these constructions were given the act by the department, and as if the matter were the subject of original inquiry. The service conditions existing at the time of the passage of the act of 1873, the authorship of the act, the similarity of its language with the language of the department's weight circulars, the departmental construction, the construction by the attorney general, the re-enactment of the act without change after Congress had been specifically informed of the practice under it, and other such circumstances are treated as merely confirmatory of the constructions, if they could have been a matter of serious doubt in the first instance. This we submit to be the correct line of reasoning, and we give both the method employed, the analyses of the act and the conclusions reached, our endorsement. We think we are justified in saying, from a long and intimate contact with the operations of the Post Office Department, that the act of 1873, was a piece of expert legislative draftsmanship by someone who knew not only just what was wanted but also how to put it in shape to defy successful attack upon the things it was intended to accomplish.

2. Counsel in No. 232, as we submit, has been at unnecessary pains in exposing the repeal, modification or irrelevance of every collateral statute relied upon by the Court of Claims and the inconsistencies of the

opinion of that court for all these things seem quite apparent. Authorities to sustain the propositions of law relied upon are cited in great abundance in the brief of counsel for appellant in the Northern Pacific case, No. 109.

II.

The Contract.

1. Counsel for appellant in No. 232, relying upon its execution of the identical thing tendered by the Postmaster General as its contract, has been content to show that it was nothing more than an express agreement upon a statutory contract; that the correspondence "on the side" was no more than each party's construction of the contract; and that, in any event, nothing the Postmaster General might say or do could make any difference in the compensation for a service fully meeting the conditions imposed by law, because he was not *sui juris*.

Being concerned with a somewhat different phase of the same thing, we desire to pursue that line of argument a little further. No matter what turn the correspondence actually took, whether it resulted in an unchanged agreement clause, an augmented agreement clause, or nothing signed at all, the result was the same; all resolved into either an express or an implied contract for the performance of, and payment for service under the conditions prescribed by law and the valid regulations of the department. We have adopted the formula of the agreement clause on the distance circulars because it so clearly and briefly clothes the idea.

In all the cases, the Postmaster General wrote the railroad company a letter stating that the mails were

about to be weighed for the purpose of obtaining the data upon which the compensation might be adjusted for the ensuing term *in accordance with the several acts of Congress governing the same*. Accompanying this letter was a distance circular bearing what was known as the agreement clause, reading: "The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad mail service." In some cases, the railroad company, without altering what was already written, added thereto some such language as "exception taken to Order 412 of June 7, 1907," signed the agreement clause as augmented and sent the paper in to the department.

To this action by the railroad company the Postmaster General habitually replied, in substance and effect, that note had been taken of the exception but that the department would not enter into any contract with any railroad company whereby it would be excepted from the operation of any postal law or regulation, or any order of the Postmaster General, and that it must be understood that in the performance of the service throughout the term the company would be subject, as in the past, to all the postal laws and regulations and orders of the Postmaster General. This ended the correspondence, the service was performed and the railroad company took what money it could get, under an order stating that its compensation, *under the acts of 1873, 1876, 1878, 1905 and 1907*, would be so many dollars per mile per annum.

We submit that it is perfectly clear that, without considering the Postmaster General's reply at all, if Order 412 was valid the railroad company was bound by it notwithstanding its addition to the agreement

clause, because it had not refused the service on the terms "prescribed by law and the regulations of the department." It follows from this that although the railroad company had not signed the physical form offered it, yet it had not stipulated against Order 412 if the same were lawful, and that its action bound both itself and the Postmaster General, when he obtained the service, to the same thing as if it had not made the addition, bearing in mind all the time that this did not include any regulation which was not lawful, as a regulation contrary to law is no regulation at all.

Nor can we see that the situation is altered in any respect by the Postmaster General's reply, because this reply was nothing more than a reiteration of his original proposition, and the railroad's silence thereafter bound it to nothing^{more}. Therefore, whether it be an express or an implied contract, it was in the last analysis only one for the performance of service under the conditions prescribed by law and the regulations of the department, with the railroad entirely free to question the legality of anything advanced in the guise of a regulation. It is hardly necessary to add that the rights of the parties under contracts are the same, whether the contracts be express or implied.

2. Even if the railroad company had refused to sign anything at all, the implied contract, growing out of the Postmaster General's ordering and accepting the service and the railroad company performing it, would be precisely the same as the express or the implied contract evidenced by its signature to the proposition tendered by the Postmaster General, or to some composition of its own in which the Postmaster General's proposition was incorporated. This because the Postmaster General, by tendering a contract look-

ing for its liquidation on his part to the laws and regulations, and by virtue of the lack of a refusal of those terms by the company, would be bound to the laws and regulations and for its part the company, by performing the service and not rejecting the terms proposed would be bound by them.

3. We submit that the theory that the order stating the pay was the first tender of a contract and is binding on the railroad company is the sheerest fallacy. The Postmaster General had been obtaining and the railroad company had been performing for several months a service upon an express or an implied contract, in the performance of which by the Post Office Department the order stating the pay was only a step. Under the express or the implied contract this step was to be taken "according to the several acts of Congress governing the same," and that is what it actually purported to do. If it wasn't done that way it was subject to correction at the instance of either party.

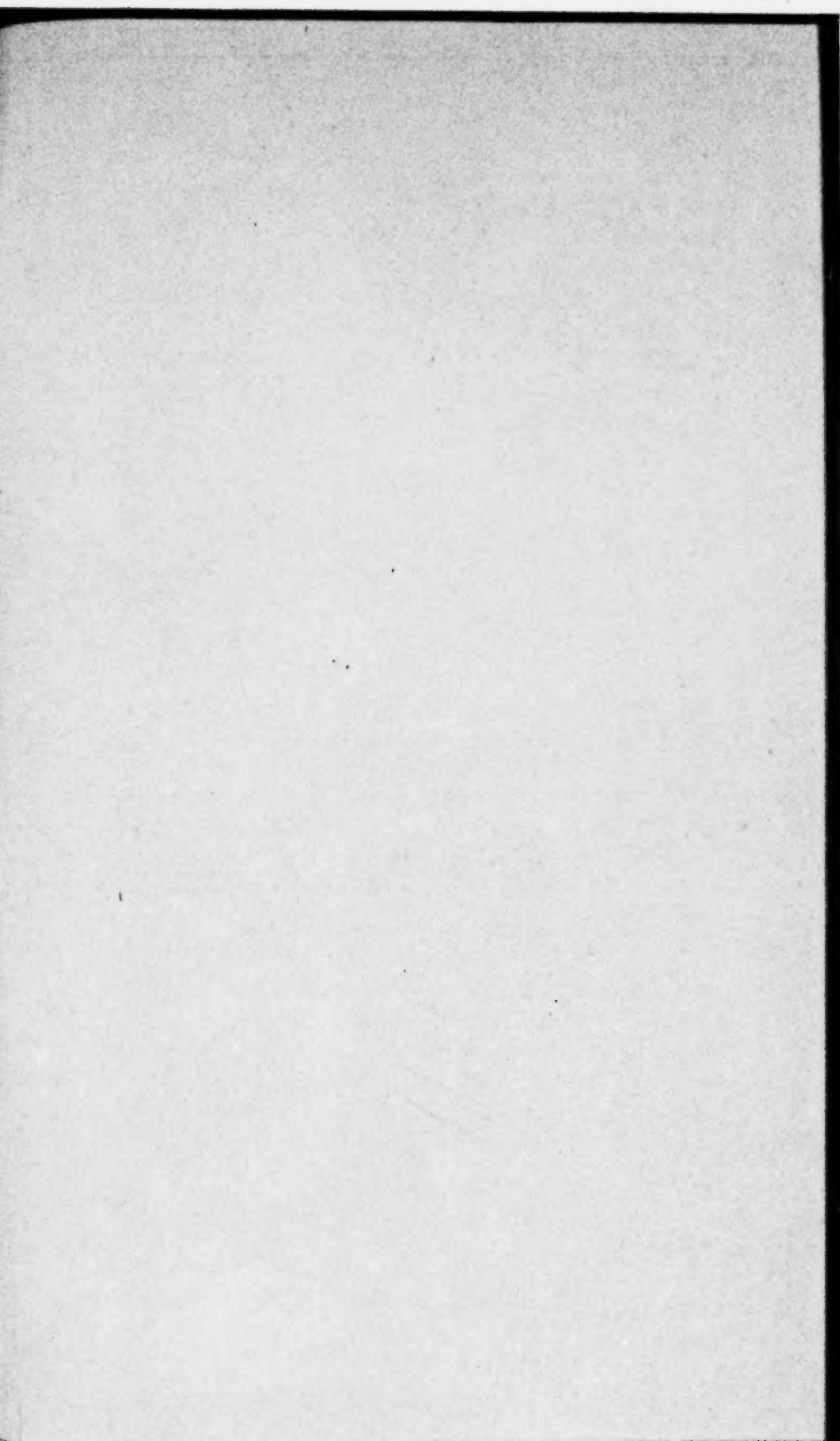
It would not help the Government's case any, however, if the order stating the pay was the contract, for the reason that any incidental statements in the order must give way to the declared governing statements if there was any inconsistency between them. The cap must fit the base. A grantee of lands contracted for and conveyed by metes and bounds is entitled to the area contained therein, regardless of what it may be stated to amount to. In this order of adjustment the Postmaster General said that he was computing the compensation of the particular route according to the acts of 1873, 1876, 1878, 1905 and 1907, and that on that basis it amounted to so much per mile per annum. The acts mentioned were the metes and bounds of the compensation. *They gov-*

ern the compensation, and the question is whether the computation is in accordance with or in defiance of them.

We submit that it is perfectly evident from the facts found that the minds of the Postmaster General and the railroad companies met upon the proposition that the service was to be performed and paid for on the terms prescribed by law and the regulations of the department, and that the question whether Order 412 was within the laws and regulations was one which would have to be a matter for judicial determination. All highly technical discussion on the subject of the contract from any other standpoint merely adds confusion to the case without leading to any different conclusion because, in the absence of any express or implied contract predicated upon a "meeting of the minds," the law steps in and raises the same contract that would have been express or implied if there had been a meeting of the minds. On the other hand, if the order stating the pay be the contract, we see that it is not the mere figures which control but the laws which were declared to have been their foundation. The result, and the ensuing inquiry, is the same by any road we travel.

No different situation can be presented except by the absolute rejection by the carrier of all propositions, coupled with a declaration of intention to seek reasonable compensation without regard to the provisions of law. We do not discuss such a situation because it is not involved in the cases before the Court or in any in which counsel is interested, so far as we know.

L. T. MICHENER,
Amicus curiae on behalf of
 the Minneapolis, St. Paul
 and Sault Sainte Marie
 Railway Company.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 132.

SEABOARD AIR LINE RAILWAY, APPELLANT,

vs.

THE UNITED STATES.

ON APPEAL FROM THE COURT OF CLAIMS.

**BRIEF AMICUS CURIAE FOR BELLEFONTE
CENTRAL RAILROAD COMPANY.**

This brief is filed, by leave of court and by consent of counsel in this case, *amicus curiae*, for the Bellefonte Central Railroad Company, claimant in a similar case in the Court of Claims.

Counsel in this case discusses with industry and conviction the effect to be given to the refusal of Congress, in 1907, to enact legislation intended to bring about a change in the method of ascertaining averages. If we were disposed to do so we could add nothing to what he says on the subject.

Reference is made to brief for appellant in the Kansas

City, Mexico & Orient Railway Co. of Texas case No. 232, and we think we should join in that reference for the reason that counsel in that case pays less attention to extraneous circumstances than other counsel do, and, to our mind, clearly shows that the act of 1873, by its own terms, irresistibly, and in every respect, compelled the construction contemporaneously and for so long given it by the officials charged with its application. We refer particularly to pages 35 and 36, where the act is analyzed with reference to whether it fixed the rate of compensation, and pages 46-47, where the act is analyzed to show that it provided exclusively a working-day divisor for a working-day service, and the same thing in every case.

It seems to us not open to dispute that if the same thing was provided for every case and that same thing was a working-day divisor, any executive order which violates the law in one case must violate it in all.

The analysis made, we submit, fairly meets the contention of the Court of Claims that "Nor could they (meaning the Postmasters General) *plainly* read into the language of the act of 1873 a requirement that the mails be weighed 35 days and divided by 30." One form of expression will do as well as another if they both mean the same thing.

But we question that it is necessary that the requirement could be *plainly* read into the act. If we understand the law of this case, it is sufficient that it can be read into the act at all, whether plainly or not, provided violence be not done to the terms of the act, and in that respect we commend to the court the discussion, in appellant's brief in No. 232, of the act on the theory that it was of doubtful meaning. Indeed, it does seem to us that, at many places in its opinion, the lower court itself has shown that the method overturned by order 412 was well within the meaning of the act.

Counsel for appellant in No. 232 has been content, by showing that a working-day divisor was the only one possible under the act, to negative thus the idea that there was room

in the act for the divisor sought to be established by order 412. Along this line, it is sufficient to say that order 412 gives no effect at all to the word "working" in the act, because it sets up the sole rule which entirely ignores its presence. A 7-day divisor is impossible under the plain language of the act if effect is to be given to every word in it. And the meaning of an inflexible law is not to be changed by a change in conditions which might make it seem desirable to some that a rule established by that law be changed. The law must nevertheless be followed until changed by Congress itself.

Merritt *vs.* Welsh, 104 U. S., 694.

With the foregoing additions, the brief of appellant in the Kansas City, Mexico & Orient case so precisely fits our views that we feel impelled to say that it is not likely to be met by the Government's brief in any other case. I am authorized to say that this expresses the sentiments of counsel in many cases other than those now before the court.

Respectfully submitted,

R. STUART KNAPP,
Amicus Curie.

(26,586)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 500.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD
COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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I. *Petition. Filed April 6, 1914.*

In the Court of Claims of the United States, General Jurisdiction.

No. 32812.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY

VS.

THE UNITED STATES.

Petition.

(Filed April 6, 1914.)

To the Honorable the Chief Justice and Judges of the Court of Claims:

I.

Petitioner, The New York Central and Hudson River Railroad Company, is a corporation incorporated and organized under the laws of the State of New York, and as such corporation maintains and operates, and during all of the times hereinafter mentioned did maintain and operate, as a common carrier of passengers and freight certain lines of railway in or through various States of the United States, each and every of which line of railway by virtue of the provisions of section 3964 of the Revised Statutes of the United States constituted a duly established "post road," over and along which the Postmaster General of the United States was and is authorized by virtue of the provisions of section 3965 of the Revised Statutes of the United States to provide for the carriage of the mails "as often as he, having due regard to productiveness and other circumstances," may think proper.

II.

In the construction of its said railway lines, or any of them, petitioner was not aided by any grant of lands or other property of value made to it by the United States.

III.

By virtue of the above circumstances, and particularly by virtue of the provisions of the Revised Statutes of the United States above referred to, and the provisions of other sections of said Revised Statutes cognate thereto, your petitioner at an early date entered into contractual relations with the United States whereby it became bound

to transport over such of its said lines of railway upon which "post routes" had been duly established by the Postmaster General all mail matter tendered to it at rates specifically agreed upon or especially authorized by law, and not otherwise.

IV.

Prior to July 1, 1873—that is, at various times in the years 1867-1872—the Postmaster General, for the purpose of arranging the railway routes on which the mails were being carried into three classes, according to the size of the mails, the speed at which
3 carried, and the frequency and importance of the service, so that each railway company should receive, "as far as practicable, a proportionate and just rate of compensation, according to the service performed" (acts of March 3, 1845, section 19, 5 Stats., 738, and June 8, 1872, chapter 335, 17 Stats., 309; sections 3997-3999, Revised Statutes of the United States), issued a "railroad weight circular" to the proprietors of the various railroad mail routes, requesting them to weigh all through and way mails conveyed in both directions to and from every station "for thirty consecutive working days" and to report results to the Department on a tabular form which was annexed to said circular.

Many of the company carriers complied with such request, and from time to time revisions and readjustments in the rates of mail pay, based upon such returns, were made, and in numerous cases of disagreement between the Department and the carriers such returns were referred to and used as a guide to the settlement of the dispute (Reports of Postmaster General for 1867 and subsequent years). Under such "railroad weight circular" it was the practice of the various railroad mail carriers, well known to and acquiesced in by the chief executive officials of the Post-Office Department, to weigh the mails carried in both directions to and from every station for an entire period of five weeks or thirty-five days, which period necessarily contained thirty consecutive working or secular days and five non-secular or Sabbath days, and having thus ascertained the whole weight of the mails carried for "any distance" and the average weight carried the whole length of the line for such entire period, the latter average weight was then divided by 30, the number of secular or working days contained in said weighing period, and the average total weight carried the whole distance or entire length of the line "per day" was thus ascertained. The result so ascertained, considered in connection with the speed at which the mails were conveyed
4 on the several lines and the "importance" of the service, determined the "class," whether "first," "second," or "third," of the particular "route," and likewise determined the maximum rate of the compensation which the Postmaster General by law was authorized to contract to pay for service on such route, all such maximum compensations being prescribed by the statute in terms of "dollars per mile per annum."

V.

Great complaint having been made by some of the principal railroad companies carrying the mails because of the inadequacy of the pay received for such service, the Postmaster General, "in justice to this class of roads," recommended "a careful revision and readjustment by Congress of railroad compensation and the establishment of such rates as will be just and equitable to all concerned" (Report Postmaster General for 1869, pp. 11, 12), and such complaints and recommendation were followed by the enactment by the Congress in and as a part of the act making appropriations for the expenses of the Post-Office Department for the fiscal year ending June 30, 1874, approved March 3, 1873 (17 Stats., 558, sec. 4002), of the following, to wit:

"For increase of compensation for the transportation of mails on railroad routes upon the condition and at the rates hereinafter mentioned, five hundred thousand dollars, or as much thereof as may be necessary: Provided, That the Postmaster General be, and he is hereby, authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned, to wit: That the mails shall be conveyed with due frequency and speed; that sufficient and suitable room, fixtures and furniture, in a car or apartment properly lighted and warmed, shall be provided for route agents to accompany and distribute the mails, and that the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average of mails per day of two hundred pounds, fifty dollars; five hundred pounds, seventy-five dollars; one thousand pounds, one hundred dollars; one thousand five hundred pounds, one hundred and twenty-five dollars; two thousand pounds, one hundred and fifty dollars; three thousand five hundred pounds, one hundred and seventy-five dollars; five thousand pounds, two hundred dollars, and twenty-five dollars additional for every additional two thousand pounds, the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times, after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

VI.

Subsequent to the enactment of the above-quoted provisions of law the Postmaster General, for the purpose of putting the same into effect, adopted the division of the United States into four sections theretofore made, and provided for the weighing of the mails in each section in rotation once in each four-year period, and fixed the compensation to be paid for service to be rendered on each and all railway routes in each section for the ensuing term of four years

by multiplying the number of miles in length of the route over which the transportation was to be had by the maximum rate or amount specified in said law of 1873 as applicable to the average weight of the mails carried per day throughout the whole length of the particular route.

In administering the provisions of the act of March 3, 1873, prior and up to July 1, 1876, the daily "average weight" carried was ascertained in each instance by the railroad companies transporting the same, and subsequent to that date by Government agents acting under the direction of the Postmaster General, by actually weighing the mails as and when transported during weighing periods of thirty-five days (later of 105 days) and dividing the total weight so ascertained by 30 days (or 90 days), such divisors representing the total "successive working" or secular days contained in each of such weighing periods, the quotient so obtained being accepted by the Department and the carriers as representing the "average weight of the mails per day" carried throughout the whole length of any particular route.

In practice the average weights of mails carried and the compensation to be paid to the railway company carriers therefor was represented and evidenced as follows, to wit:

To each railway company over whose rails or any portion thereof mail routes had been or were about to be established the Second Assistant Postmaster General, acting in such regard by direction of the Postmaster General, sent a so-called "distance circular," the same being a printed circular of instructions with blank forms attached, upon which forms the companies receiving the same were requested to inform the Department as to the names of stations and distances between stations and junction points at which the mails were to be handled, the names of stations at which agents were maintained and of those at which no agent or other employee was maintained, the names of post-offices receiving mail directly from the route, the distances by shortest route used by the public between nearest baggage-room door and nearest practicable door of post-office building, etc., etc., all of which information when scheduled as desired was verified as correct by some competent officer of the company. Upon the second page of such "distance circular" appeared the following:

"The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail service.

"President or General Manager."

7 When this agreement had been properly signed and the "distance circular" containing the same, together with the information requested, had been verified and returned to the Department, and the weighing of the mails on the particular route for the particular weighing period had been completed and the daily average weight of mails carried the whole length of the route had been ascertained in the manner heretofore described, the Postmaster General, as authorized by law, fixed the compensation to be paid to

the carrier for the service to be rendered in carrying the mails upon the particular route for the ensuing term of four years and there was sent to the carrier formal notice of such action in the form following, to wit (omitting headings and titles) :

"The compensation for the transportation of mails on route No. —, between — and —, has been fixed from July 1, 18—, to June 30, 18—, under act of March 3, 1873, upon returns showing the amount and character of the service for 30 successive working days, commencing —, 18—, at the rate of \$—, per annum, being \$— per mile for — miles.

"This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week."

VII.

The Postmaster General had full legal authority to contract in such manner with carriers by rail for the carriage of the mails without previous advertisement (R. S. U. S., sec. 3942), and since the date of the enactment of said act of March 3, 1873, to the present time has uniformly done so. For the service thus contracted for it has been the uniform and consistent practice of the Post-Office Department, so far as the mail routes referred to in this petition are concerned, to pay at the maximum rates provided and allowed by the current law.

8

VIII.

By an act of Congress approved July 12, 1876, making appropriations for the expenses of the Post-Office Department for the fiscal year ending June 30, 1878 (19 Stats., 79), the Postmaster General was—

"directed to readjust the compensation to be paid from and after the first day of July, eighteen hundred and seventy-six, for transportation of mails on railroad routes by reducing the compensation to all railroad companies for the transportation of mails ten per centum per annum from the rates fixed and allowed by"

the act of March 3, 1873, and by act of Congress approved June 17, 1878, making appropriations for the expenses of the Post-Office Department for the fiscal year ending June 30, 1879 (20 Stats., 142, —), the Postmaster General was required to still further reduce the compensation to be paid for the transportation of mails on railroad routes

"five per centum per annum from the rates for transportation of mails, on the basis of the average weight fixed and allowed by the first section"

of the act of July 12, 1876, next above referred to.

IX.

In administering said provisions of said acts of 1876 and 1878 and in making the reductions therein specified and required the Postmaster General used as bases the maximum rates of pay provided for in and by the act of 1873, as ascertained by the method and practices respecting average weights adopted by the Department and hereinbefore described, which said methods and practices, until about June 7, 1907, were uniformly and consistently followed
 9 and practiced by the Post-Office Department, so far as the mail routes referred to in this petition are concerned.

X.

The method of determining a proper and equitable rate of compensation for the transportation of the mails on railroad routes constituted the subject of various official representations to the Congress by succeeding Postmasters General, who not infrequently referred in such reports to the unscientific and in some respects unsatisfactory method in vogue for fixing the same, which method, however, had been and continued to be in use by the Department for many years. The annual report of the Postmaster General to the Congress for the year 1884, contained at page 106 and subsequent pages thereof, a draft of a proposed bill for the readjustment of such compensation, which draft among other things proposed to alter the then existing method and practice of obtaining daily average weights of mails carried, by providing that such daily average weights should be ascertained "by a weighing of not less than twenty-eight consecutive days." Later a bill containing such a provision was introduced in the House of Representatives, but no action by the House was had thereon.

In September, 1884, the then Postmaster General promulgated a postal regulation known as "Order No. 44," which was in words and figures following, to wit:

"Order No. 44. Hereafter, when the weight of mails is taken on the railroad routes performing service seven days per week, the whole number of days the mails are weighed, whether thirty or thirty-five, shall be used as a divisor for obtaining the average weight per day."

And thereafter, on October 22, 1884, the then Postmaster General submitted to the Attorney General of the United States for his opinion the question as to whether the method of ascertaining
 10 the average daily weight of mails carried in use in the Department and hereinbefore described (not including the method described in Order No. 44), was a proper method of ascertaining such average weight under the provisions of said act of March 3, 1873 (R. S. U. S., section 4002).

October 31, 1884, the then acting Attorney General, Mr. Samuel F. Phillips, replied (18 Ops. Att'y Gen'l, p. 71) to such submission as follows:

"SIR: I have considered your communication of the 22d instant, requesting to know whether the construction placed by the Post-Office Department on section 4002, subordinate section 2, prescribing the mode in which the average of the weight of mails transported on railroad routes shall be ascertained, is correct, and am of opinion that that construction is correct, and that a departure from it would defeat the intention of the law and cause no little embarrassment."

And consequently said "Order No. 44" never went into practical use and effect.

January 21, 1885, the then Postmaster General, complying with the Senate resolution adopted January 19, 1885, transmitted to the Senate a certain communication which was subsequently printed as Senate Executive Document No. 40 of the Forty-eighth Congress, second session, wherein the Postmaster General gave "a documentary history of the railway mail service from its origin in 1834 until the present time," and specifically called attention to the manner in which the said act of March 3, 1873, (R. S. U. S., section 4002, sub-sec. 2), had been administered in obtaining the daily average weight of mails carried on railroad routes.

The Congress being so fully and officially informed of the construction placed upon the quoted provisions of said act of March 3, 1875 (R. S. U. S., section 4002, sub-sec. 2), and of said subsequent acts approved July 12, 1876 (19 Stats., 19), and June 17, 1878 (20 Stats., 142), hereinbefore referred to and the method and practices prevailing in the Post-Office Department in the administration of said acts, nevertheless, by the act approved March 3, 1905, "Making appropriations for the service of the Post-Office Department for the fiscal year ending June 30, 1906" (33 Stats., 1082 11 1088), provided:

"That hereafter before making the readjustment of pay for transportation of mails on railroad routes, the average weight shall be ascertained by the actual weighing of the mails for such a number of successive working days not less than ninety, at such times after June thirtieth, nineteen hundred and five, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

Thereafter, in administering such quoted provision of said act of 1905, the Postmaster General continued the method and practice of ascertaining the daily average weight of mails carried on railroad postal routes which had theretofore prevailed in the administration of the act of 1873 and subsequent cognate statutes hereinbefore referred to, with the single exception that in the place and stead of the former weighing period of thirty-five days there was adopted and put in force a weighing period of one hundred and five days, which latter period was intended to include and uniformly did include "a number of successive working days not less than ninety" as prescribed by said act of 1905, the number ninety being used as a divisor instead of the number thirty as theretofore.

XI.

Subsequent to said March 3, 1905, the Post-Office Department adopted and used in connection with the so-called "Distance Circular" hereinbefore described a form of notice respecting the compensation fixed for service in carrying the mails on the various
 12 railroad postal routes, which notice (omitting headings, address, and titles) was and is in the words and figures following, to wit:

"The compensation for the transportation of mails, etc., on Route No. —, between — and —, has been fixed from July 1, 190—, to June 30, 190— (unless otherwise ordered), under acts of March 3, 1873, July 12, 1876, June 17, 1878, and March 3, 1905, upon returns showing the amount and character of the service for — successive working days, commencing —, 190—, at the rate of \$— per annum, being \$— per mile for — miles.

"This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week."

XII.

At the second session of the Fifty-ninth Congress the Committee on Post-Offices and Post-Roads of the House of Representatives prepared and introduced a bill making appropriations for expenses of the Post-Office Department for the fiscal year ending June 30, 1908, and the same became law on March 2, 1907. As drawn by said committee said bill contained, among other things, the following provision:

"Provided, That hereafter the average weight per day be ascertained, in every case, by the actual weighing of the mails for such a number of successive days, not less than one hundred and five, at such times and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

Said bill was accompanied by a report of said committee which fully explained the construction and practice, under said previous acts of Congress, in the weighing of the mails, and that the purpose of said provision in the bill was to change the method of ascertaining the daily average weights by requiring that all of the days in
 13 the weighing period be included in the divisor. There was extensive debate in the House on said provision, in which many members participated. In said debate the chairman of said committee and other members of the House stated and discussed the history, as hereinbefore narrated, of said existing practice of including the secular days only in the divisor of weights. Before the House had acted on said provision a motion was made to amend the bill by inserting the following proviso, referring to the sum appropriated for the Railway Mail Service:

"Provided, That no part of this sum shall be expended in payment for transportation of the mails by railroad routes where the average weight of mails per day has been computed by the use of a divisor less than the whole number of days such mails have been weighed."

A point of order was made against this amendment on the ground that it changed existing law, and the chair sustained the point, observing:

"The existing law has received a construction by the officers charged with the duty of administering it, and that construction the chair feels bound to follow. The proposed amendment changes existing law as construed by the proper officer by changing the divisor."

Upon appeal from the decision of the chair, its ruling was sustained.

Another amendment was then offered, as follows:

"Provided, That no part of this sum shall be expended in payment for transportation of the mails by railroad routes where the average weight of mails per day has been computed by the use of a divisor less than the whole number of working days such mails have been weighed; and

14 "Provided further, That the words 'working days' shall be construed to mean days upon which work in the transportation of the mails by railroad routes is performed."

Said second amendment was also rejected after debate, and the provision reported by the Committee on Post-Offices and Post-Roads was then stricken out. Thereafter an amendment was offered by the chairman of said committee, which was adopted by the House as follows:

"The Postmaster General is hereby authorized and directed to readjust the compensation to be paid from and after the first day of July, nineteen hundred and seven, for the transportation of mail on railroad routes carrying their whole length an average weight of mail per day of upward of five thousand pounds by making the following changes in the present rates per mile per annum for the transportation of mail on such routes, and hereafter the rates on such routes shall be as follows:

"On routes carrying their whole length an average weight of mail per day of more than five thousand pounds and less than forty-eight thousand pounds the rate shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds, and on routes carrying their whole length an average weight of mail per day of more than forty-eight thousand pounds the rates shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds up to forty-eight thousand pounds, and for each additional two thousand pounds in excess of forty-eight thousand pounds at the rate of nineteen dollars and twenty-four cents upon all roads other than land-grant roads, and upon all land-grant roads the rate shall be seventeen dollars and ten cents for each two thousand pounds carried in excess of said forty-eight thousand pounds."

When this bill had gone from the House of Representatives to the

Senate and had been reported by the Senate Committee on Post-Offices and Post-Roads an amendment was offered in the identical language of the amendment first rejected by the House. Said amendment was not debated or explained but was adopted by the Senate. The bill was then sent to a conference of the two Houses. In the conference objection was made on the part of the House conferees to said Senate amendment, and the committees of conference in their report, recommended that the Senate recede from the same, and the two Houses adopted said reports and passed the bill (which as above stated became law March 2, 1907; 34 Stats., 1205, 1212) with said amendment stricken out, but containing in the precise form above quoted the provision which had been inserted by amendment in the House of Representatives.

When offering the amendment which was adopted in the House, the chairman of the Committee on Post-Offices and Post-Roads pointed out that the pending bill had provided four distinct reductions (including the three carried in the provision hereinbefore set out) in the compensation of railway mail carriers, and he explained that two of said four reductions, viz., that carried by the amendment he was offering and one other, relative to pay for post-office cars, had been selected as those which the House apparently preferred to adopt.

XIII.

Thereafter, on March 2, 1907, and on June 7, 1907, the Postmaster General promulgated certain postal regulations which were designated and are respectively known as Order No. 165 and Order No. 412, which said orders read as follows, to wit:

"Order No. 165. That when the weight of mail is taken on railroad routes the whole number of days the mails are weighed shall be used as a divisor for obtaining the average weight per day."

"Order No. 412. Ordered, that Order 165, dated March 2, 1907, be, and the same is hereby, amended to read as follows:

16 "That when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day."

In accordance with the last-named order, which was intended to cover all weighings and readjustment made subsequent to its promulgation, the Postmaster General required all mails carried on railroad routes to be weighed during the entire weighing period of 105 days and divided the aggregate weights so obtained by 105, and the readjustments were made on the basis of average weight per day so computed and ascertained, and the carrier company has since been paid accordingly.

XIV.

Prior to the year A. D. 1873, and for the entire period subsequent to said year and prior to July 1, 1909, your petitioner directly or through its predecessors had owned and operated over its various

lines of railway certain railway postal routes, said postal routes being more specifically designated by numbers as follows, to wit:

107001	107035	107103	107144
107013	107036	107106	107163
107014	107037	107107	107164
107016	107039	107115	107168
107017	107049	107119	107171
107018	107071	107125	110065
107021	107083	107129	110139
107022	107087	107138	110228
107034			
104025	104030	104066	104074
104028	104031	104068	107069
104029	104041		

on all of which routes the average weight of mails so carried and the amount of the compensation to be paid and which was paid to petitioner for the service rendered in connection with such carriage, had been ascertained, fixed, and notified to your petitioner in the manner and by the method and practices hereinbefore pointed out as adopted by and in use by the Post-Office Department, not including therein, however, the practices prescribed by either of the said orders numbered 165 or 412. Due performance of all contracts for compensation so entered into by and with your petitioner for the services rendered by it on said routes prior to June 30, 1909, has been made by the United States and no question is here raised or claim made with respect thereto.

XV.

Prior to the end of the quadrennial term expiring June 30, 1909, on the routes operated by your petitioner and above specified, the Postmaster General notified petitioner of the directions respecting the ascertainment of the daily average weight of the mail carried which were contained in and prescribed by Order No. 412, and accompanied such notices with blank forms of "Distance Circular," sometimes called "Form No. 2504," the substance of the contents of which circular has hereinbefore been set forth. Copies of "Form No. 2504" so transmitted to and received by your petitioner contained the so-called "acceptance clause," hereinbefore quoted in full.

Before the weighing of the mails carried on its various routes for the quadrennial term beginning July 1, 1909, and ending June 30, 1913, had been completed and the daily average weight carried had been ascertained and noted as required by said directions, your petitioner, with respect to each of its aforesaid routes, returned to the Second Assistant Postmaster General the completed distance circular containing the agreement clause set forth therein, duly executed by one of its executive officers, authorized so to do, with specific exception thereon noted to Order No. 412; such agreement

18 clause, as modified by the claimant's exception and as executed by it, reads as follows:

"The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the existing regulations of the Department applicable to railroad mail service, excepting Order No. 412, issued by the Postmaster General June 7, 1907. This company cannot accept as full compensation for services rendered the amount fixed according to the method of computation of average weight prescribed by said order, and reserves the right to insist on payment according to the method of computing the average weight applied by the Department prior to the issuance of Order No. 165, issued by the Postmaster General March 2, 1907."

In reply the Second Assistant Postmaster General wrote to petitioner in respect to each of said postal routes substantially as follows:

"SIR: This office is in receipt of your letter of the —, enclosing distance circular for the term beginning July 1 on routes of the lines above named, as follows:

* * * * *

"Note is taken of the modification made by the companies in the agreement clause in which they except Order No. 412, issued by the Postmaster General June 7, 1907. In regard to this I have to advise you that the Department will not enter into contract with any railroad company by which it may be excepted from the operation or effect of any postal law or regulation, and it must be understood that, in the performance of service, from the beginning of the contract term named above and during the continuance of such performance of service, these companies will be subject, as in the past, to
19 all the postal laws and regulations which are now or may become applicable during the term to this service.

"Very respectfully,

"JOSEPH STEWART,

"Second Assistant Postmaster General."

And notwithstanding your petitioner's said protests the Postmaster General caused the mails to be weighed on each of said routes for 105 days, then caused the average daily weight carried thereon to be computed as provided in said Order No. 412, and on the basis of the weight so ascertained caused the compensation for the service to be calculated, and subsequently issued orders stating the amounts and rates of such compensation. Said orders were in the form below:

"No. of order —, route —, and —, — miles, t. a. w., a. d. w.

"From July 1, 1909, to June 30, 1913, pay the ——— Railroad Co. quarterly for the transportation of the mails between ——— and ——— at the rate of — per annum, being — per mile for — miles, and for R. P. O. car service at the rate of — per annum, being \$— per mile for — miles, — to — for — lines — foot cars. This adjustment is

subject to future orders, and to fines and deductions, and is based on a service of not less than 6 round trips a week.

"FRANK H. HITCHCOCK,
"Postmaster General."

Thereafter, as to each of said routes, the Second Assistant Postmaster General sent a notice to claimant of such readjustment of pay for the service beginning July 1, 1909, such notice being in the form following, to wit:

"SIR: The compensation for the transportation of mails, etc., on route No. —, between — and — has been fixed from
20 July 1, 1909, to June 30, 1913 (unless otherwise ordered), under acts of March 2, 1907, upon returns showing the amount and character of the service for a number of successive working days, not less than ninety, commencing —, at the rate of \$— per annum, being \$— per mile for — miles, and pay is allowed for use of R. P. O. cars from July 1, 1909, to June 30, 1913, at the rate of \$— per annum, being \$— per mile for — miles, — to —, for — lines — foot cars.

"This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week.

"Very respectfully,

"JOSEPH STEWART,
"Second Assistant Postmaster General."

XVI.

Under the circumstances above narrated, and under protest against the application to each and every of its said postal routes of said postal regulation or Order No. 412, commonly referred to as "Divisor Order No. 412," which said regulation or order petitioner has continually asserted and hereby asserts the Postmaster General was without legal power or authority to issue or to make application thereof in so far as either ascertaining the daily average weight of mails carried over its said postal routes, or fixing the compensation to be paid to it for the service rendered in so doing is concerned, your petitioner has expeditiously, safely, and with certainty carried all the mails which have been tendered to it for transportation since July 1, 1909, and for all such service so rendered, notwithstanding its said protest and the lack of lawful authority on the part of the Postmaster General so to do, your petitioner has been paid only at the reduced rates of compensation ascertained by the application and use of said unjust and illegal Divisor Order No. 412.

XVII.

The premises considered, your petitioner alleges that it has been illegally and improperly deprived of compensation for the

21 services rendered by it to the United States in transporting the mails which have been tendered to it by the Post-Office Department for transportation over its postal routes aforesaid during the period from July 1, 1909, to July 1, 1913, in the sum of one million two hundred sixty-one thousand three hundred eighty dollars and thirty-seven cents (\$1,261,350.37), for which amount, the same remaining wholly unpaid, petitioner here prays judgment against the United States.

THE NEW YORK CENTRAL AND HUDSON
RIVER RAILROAD COMPANY.

By A. H. SMITH, *President*.

STATE OF NEW YORK,
County of New York:

I, Alfred H. Smith, being first duly sworn, depose and say that I am the President of The New York Central & Hudson River Railroad Company, and am authorized to execute the foregoing and annexed petition. I have read said petition and know the contents thereof and the matters of fact therein alleged are true to the best of my knowledge, information, and belief.

A. H. SMITH, *President*.

Subscribed and sworn to before me this 30th day of March, A. D. 1914.

[NOTARIAL SEAL.]

J. M. O'MAHONEY,
Notary Public, New York Co., N. Y., No. 2911.

New York Co. Register No. 5074.

My commission expires March 30, 1913.

McKENNEY, FLANNERY & HITZ,
Hibbs Building, Washington, D. C.,
Attorneys for Claimant.

22

II. *General Traverse.*

Court of Claims.

No. 32812.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY

VS.

THE UNITED STATES.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

III. *Argument and Submission of Case.*

On January 22, 1918, the case was argued by Mr. F. D. McKenney, for the claimant; arguments were also made by the Solicitor General, Mr. John W. Davis, and Assistant Attorney General, Mr. Huston Thompson, for the defendants in all the cases; on January 23, 1918, the case was submitted on arguments made in this and other Divisor cases.

23 IV. *Findings of Fact and Conclusion of Law.*

Filed March 11, 1918.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The plaintiff herein, The New York Central and Hudson River Railroad Company, is a corporation organized and doing business under the laws of the State of New York, and is now, and for many years has been, the owner of and engaged in maintaining and operating as a common carrier of passengers and freight, certain lines of railway in and through various States of the United States, among others the States of New York and Massachusetts. Each and every of such lines of railway is a duly constituted "post road" over and along which the Postmaster General of the United States was and is authorized by law to agree with plaintiff for the carriage of the mails and pay for such service.

The particular lines and postal routes hereinafter referred to, over which plaintiff during the times mentioned transported the mails of the United States, are the following:

Route.	Terminal.	Period.
107011.	New York (Grand Central Station) and Buffalo, N. Y.	July 1, 1909, to June 30, 1913.
107013.	Syracuse and Rochester, N. Y.	Do.
107014.	Canandaigua and North Tonawanda, N. Y.	Do.
107016.	Buffalo and Lewiston, N. Y.	Do.
107017.	New York (155th Street Station) and Brewster, N. Y.	Do.
107018.	Rochester and North Tonawanda, N. Y.	Do.
107021.	Rochester and Charlotte, N. Y.	Do.
107022.	New York (Grand Central Station) and Chatham, N. Y.	Do.
107034.	Bridge Station (Niagara Falls) and Richland, N. Y.	Do.
107035.	Watertown and Cape Vincent, N. Y.	Do.
107036.	Rome and Massena Springs, N. Y.	Do.
107037.	Syracuse and Pulaski, N. Y.	Do.
107039.	Newton Falls and Sacket Harbor, N. Y.	Do.
107049.	Gouverneur and Edwards, N. Y.	Do.
107069.	Hudson and Chatham, N. Y.	Do.
107071.	Syracuse and Earlville, N. Y.	July 1, 1909, to June 30, 1911.
107087.	Utica and Ogdensburg, N. Y.	July 1, 1909, to June 30, 1913.
107103.	Lyons, N. Y., and Williamsport, Pa.	Do.
107106.	Albany and Troy, N. Y.	Do.
107107.	Lockport Jet. (n. o.) and Suspension Bridge (n. o.), N. Y.	Do.
107115.	Rivergate (n. o.) and Clayton, N. Y.	Do.
107119.	Herkimer and Malone, N. Y.	Do.
107125.	De Kalb Junction and Ogdensburg, N. Y.	Do.

107129.	New York (foot Desbrosses Street) and Albany, N. Y.....	Do.
107138.	Oswego and Woodard Junction (n. o.), N. Y.....	Do.
107144.	Churchville Junction (n. o.) and Buffalo (Exchange Street Depot), N. Y.....	Do.
24		
107163.	Dolgeville and Little Falls, N. Y.....	May 1 to June 30, 1913.
107164.	Canadian Boundary line (n. o.) and Tupper Lake, N. Y.....	Do.
107168.	Lake Clear Junction (n. o.) and Saranac Lake, N. Y.....	July 1, 1909, to June 30, 1913.
110065.	Kress and Antrim, Pa.....	Do.
110139.	Lawrenceville and Ulysses, Pa.....	Do.
110228.	Jersey Shore and Mahaffey, Pa.....	Do.
104025.	Boston, Mass., and Albany, N. Y.....	July 1, 1909, to June 30, 1911.
104028.	South Framingham and Milford, Mass.....	Do.
104029.	Pittsfield and North Adams, Mass.....	Do.
104030.	Palmer and Winchendon, Mass.....	Do.
104031.	North Brookfield and East Brookfield, Mass.....	Do.
104041.	East Somerville (n. o.) and South Terminal Station (n. o.), Mass.....	Do.
104066.	Spencer and South Spencer, Mass.....	Do.
104068.	Springfield and Athol, Mass.....	Do.
104074.	Boston and Riverside Junction (n. o.), Mass.....	Do.

In the construction of the above-indicated lines of railroads the plaintiff was not aided by any grant of lands or other property made thereto by the United States.

II.

In 1867 the mails were being conveyed under agreements made between the railroad companies and the Post Office Department in pursuance of the act of Congress of 1845, and thereafter were carried up to the time of the passage of the act of 1873 under similar agreements. At the latter date a majority of the railroad postal routes carried the mails six days per week, so as to make six round trips per week, and did not carry mails on Sundays. A much smaller number of railroad postal routes carried mails one or more times each day in the week, so as to make not less than seven round trips per week, and these carried mails on Sundays.

After order No. 412 was promulgated and became effective for the routes involved the service performed by plaintiff thereon was on six days in the week on routes Nos. 104028, 104030, 104031, 104041, 104066, 104068, 104074, 107013, 107014, 107017, 107021, 107022, 107035, 107049, 107069, 107107, 107119, 107125, 107138, 107144, 107163, 107164, 110139, and 110228, the aggregate annual pay for which was \$111,318.33; and seven days in the week on routes Nos. 104025, 104029, 107011, 107016, 107018, 107034, 107036, 107037, 107039, 107071, 107087, 107103, 107106, 107115, 107129, 107168, and 110065, the aggregate annual pay for which was \$2,170,121.46.

After the enactment of the act of 1873 the mails were carried by plaintiff over railroad postal routes under agreements between the Post Office Department and plaintiff, and were being so carried at the date of order No. 412, promulgated June 7, 1907. At said date the relative proportion of seven and six days' carriage of mails had changed, and over a majority of the railroad postal routes mails were being carried every day in the week.

III.

For a long time previous to 1867 mails were carried by railroad companies under separate contracts between such companies and the Post Office Department under authority of the acts of Congress referred to by the Postmaster General in his report for 1867,

25 namely, those approved July 7, 1838, 5 Stat., 283; January 25, 1839, 5 Stat., 314, and March 3, 1845, 5 Stat., 732-738.

The last-named act provided that to insure as far as may be practicable, an equal and just rate of compensation, according to the service performed, among the several railroad companies in the United States for the transportation of the mail, it should be the duty of the Postmaster General to arrange and divide the railroad routes, including those in which the service is partly by railroad and partly by steamboat, into three classes, according to the size of the mails, the speed with which conveyed, and the importance of

the service, and it should be lawful for him to contract for conveying the mail with any such railroad company, either with or without advertising for such contract. Maximum rates were fixed for service rendered by the three classes, respectively, and the Postmaster General was authorized, in case he should not be able to conclude a contract for carrying the mail on any of such railroad routes at a compensation not exceeding the maximum rates, or for what he might deem a reasonable and fair compensation for the service to be performed, to separate the letter mail from the residue of the mail and to contract, either with or without advertising, for conveying the letter mail over such route, by horse, express, or otherwise, at the greatest speed that could reasonably be obtained, and also to contract for carrying over such route the residue of the mail, in wagons or otherwise, at a slower rate of speed.

With reference to the ascertainment of the "size of the mails" in order to make the classification authorized by the last named act, the above-mentioned Postmaster General's report states as follows:

"In order to make such an arrangement and classification of railroad routes as the act last mentioned contemplates, there is an obvious necessity for accurate and reliable information as to the 'size of the mails' they severally convey. Yet, until recently, no measures were ever taken to procure from any considerable proportion of the roads in the service of the department statements of the amounts of mail matter conveyed by them, respectively. In February and March last, however, a 'railroad weight circular' (a copy of which is hereto annexed) was issued and addressed to the proprietors of each railroad route, requesting them to 'weigh all the through mails and way mails' conveyed in both directions to and from every station for 30 consecutive working days, commencing on all roads east of the Rocky Mountains on the 1st, and on all roads west on the 15th of April, 1867, and report the results to the department in a prescribed tabular form annexed to the circular, and to return also a description of the accommodations provided for mails and agents, with the dimensions, fixtures, and furniture of the car or apartment allotted to their use, and a statement of the number of trips per week in each direction.

* * * * *

"No general systematic revision and readjustment of these rates, based upon the returns received, has yet been attempted, but in a number of cases of disagreement between the department and railroad companies the returns have been used as a guide to a proper settlement of the dispute; and, as the terms of existing contracts expire and it becomes necessary to enter into new engagements, 26 it is expected that such changes will from time to time be made as will eventuate ultimately in the nearest practicable approach to a perfect classification of railroad routes and graduation of their pay according to the comparative value and importance of the service they perform."

The result furnished data for each route respecting the whole weights of mails carried in each direction, the total weight and the

average weight carried the whole distance for the 30 consecutive working days, and the average weight carried the whole distance per day, ascertained by dividing such average total weight by 30, the size of mail car or apartment, and the number of trips performed per week.

In the years 1868, 1869, 1870, 1871, and 1872, revisions and readjustments of the rates of pay on railroad routes were made under the terms of the law of 1845 according to classifications based upon the returns of the weight of the mails conveyed and the accommodations provided for the mails and the agents of the department, ascertained in the manner above stated. (See Reports of Postmaster General, 1868, p. 10, Table E, pp. 66, 67; 1869, pp. 10, 11, Table F, pp. 86, 87; 1870, pp. 10, 11, Table E, pp. 82, 83; 1871, p. x, Table E, pp. 48, 49; 1872, pp. 10, 11, Table E, pp. 100, 101.)

In the reports of the Postmaster General for the years 1869, 1870, and 1871, he called attention to complaints on the part of railroad companies to the inadequacy of compensation for carrying the mails, and in his report of 1870 it was stated that many of them have refused and still refuse to enter into contracts with the department, alleging that they would not bind themselves by a permanent arrangement at the present prices, and that as a consequence on many of the important roads the mails were carried as suited the convenience of the companies.

In the revision and consolidation of the statutes relating to the Post Office Department, done in 1872, 17 Stat. L., 309, certain provisions of the postal laws were changed.

The following year Congress passed the act of March 3, 1873, which is set out in the appendix to these findings.

A part of the act of 1873 was embodied in the Revised Statutes as section 4002.

Prior to July 1, 1876, the weighing was done by the railroad companies transporting the mails as above set forth. Subsequent to that time, by virtue of an act of Congress approved March 3, 1875, the weighing was done by Government agents under the direction of the Postmaster General. (See Appendix.)

IV.

Subsequent to the act of 1873 the Postmaster General, for the purpose of putting said act into effect, adopted the division of the United States, theretofore made into four sections, and had the mails weighed and the annual compensation for a term of four years stated for all railway routes in one section each year.

Before the compensation was stated for any route the Postmaster General secured from the company performing the service an agreement in the form following:

27 "The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad mail service."

After the weighing of the mails was completed and the compensa-

tion for the transportation thereof was fixed for the term the Postmaster General caused to be sent to each railroad company a notice in the form following:

"The compensation for the transportation of mails on route No. —, between — and —, has been fixed from July 1, 18—, to June 30, 18—, under act of March 3, 1873, upon returns showing the amount and character of the service for 30 successive working days, commencing —, 18—, at the rate of \$— per annum, being \$— per mile for — miles."

"This adjustment is subject to future orders and to fines and deductions and is based on a service of not less than six round trips per week."

After the passage of said act of March 3, 1875, whereby the weighings were required to be made by employees of the Department under instructions of the Postmaster General as above stated, the mails were weighed for 30 consecutive days, exclusive of Sundays, on routes not carrying mails on Sundays, and on 35 successive days, inclusive of Sundays, on routes carrying mails on Sundays, the Sunday weights being reported with the Monday weighings. The totals of the weighings in each class were used as a dividend, and in both classes 30 was used as a divisor. The quotient so obtained was treated as the average weight of mails per day carried.

From and after 1873 and until order No. 412 became effective, it was the practice of the Postmaster General, when computing the compensation payable to railroad carriers for service to be performed in transporting the mails over the several routes, to apply to the quotient obtained as above set forth, or by the act of 1905 which increased the minimum weighing days, the maximum rate allowed by statute, except in the cases of certain routes where pay was fixed, without weighing at the lowest maximum rate specified in the current law; "lap-service" routes, being cases where two different routes coincide in part over the same line of railway and the pay is adjusted on a reduced sliding scale (P. L. & R., 1913, sec. 1325); "blue tag" routes over which periodical matter is transported in sacks marked with a blue tag, in fast freight trains, at less than maximum mail rates; and "equalization rates" where competition on basis of shorter mileage accrues between carriers, and the elder road possessed of the longer mileage and the mail contract is encouraged to retain the route, but at compensation based on the lesser mileage of the junior and shorter line.

V.

The act of Congress approved July 12, 1876, and June 17, 1878 (see Appendix), each prescribed reductions in the rates of pay to railroad companies for the transportation of the mails.

In administering the provisions of said acts of 1876 and 1878, and in making the reductions therein specified, the Postmaster General started with the maximum rates of pay allowed by the act of 1873, and the pro rata maxima prescribed by the regulations of the department for intermediate weights and reduced the

rates in accordance with said acts. The maximum rates taken in connection with the averages, found as stated, and the mileage involved, furnished the amount of the annual compensation.

VI.

In his report for the fiscal year ending June 30, 1884, the Postmaster General refers to the matter of "railroad rates," as embodied in the report of the Second Assistant Postmaster General, to which he called careful attention, and adds that "it is important that the rates paid should be arrived at by some equitable method." He says that in the 50 years intervening between 1834 and 1884 "legislation has touched this subject but four times"—in 1838, 1839, 1845, and 1873; that while the system of 1873 was an improvement on what went before, it was "still objectionable," "since it undertakes to pay for weight chiefly," and that the pay per ton per mile ranged from 8 to 96 cents. He recommended the passage of a proposed bill for the readjustment of compensation for the transportation of the mails on railroad routes.

Following this report said bill was introduced in the House, but no action was taken by the House on said bill, H. R. 3057 and 6124, 49th Cong.

In September, 1884, the then Postmaster General prepared and issued an order in the form following:

"Order No. 44.—Hereafter, when the weight of mails is taken on the railroad routes performing service seven days per week, the whole number of days the mails are weighed, whether thirty or thirty-five, shall be used as a divisor for obtaining the average weight per day."

Thereafter, October 22, 1884, the succeeding Postmaster General submitted the question to the Attorney General for his opinion as to whether the method adopted was a proper construction of the act of March 3, 1873, as follows:

"SIR: The act of March 3, 1873, 17 Stat. L., p. 558, regulating the pay for carrying the mails on railroad routes, provides:

"That the pay per mile per annum shall not exceed the following rates, namely:

"On routes carrying their whole length an average weight of mails per day of 200 pounds, \$50; 500 pounds, \$75; 1,000 pounds, \$100; 1,500 pounds, \$125; 2,000 pounds, \$150; 3,500 pounds, \$175, etc." * * *

"The average weight to be ascertained in every case by the actual weighing of the mails for such a number of successive working days, not less than thirty." * * *

"Upon a large number of the railroad routes mails are carried on six days each week—that is, no mail is carried on Sunday. On others they are carried on every day in the year.

"It has been the practice since 1873, in arriving at the average weight of mails per day on these classes of service to treat the

29 'successive working days' as being composed of six secular or working days in the week, which is explained by the following illustrations:

"Two routes, Nos. 1 and 2, over each of which 313 tons of mails are carried annually.

"On route No. 1 mails are carried twice daily, except Sunday, six days per week, and are weighed 30 successive working days, covering usually a period of 35 days. The result is divided by 30 and an average weight of mails per day of 2,000 is obtained.

Transportation per mile of road per annum.....	miles..	1,252
Weight per mile of road per annum.....	tons..	313
Pay per ton per mile of road per annum.....	cents..	47.92
Pay per mile run of road per annum.....	do...	11.09
Rate of pay allowed per mile per annum.....		\$150

"On route No. 2 mails are carried twice daily, seven days per week, and weighed for 30 successive working days and for the intervening Sundays, the weight on the Sundays being treated as if carried on Mondays, the weighing as before covering usually a period of 35 days. The result is divided by 30 and an average weight of mails per day of 2,000 pounds is obtained.

Transportation per mile of road per annum.....	miles..	1,460
Weight per mile of road per annum.....	tons..	313
Pay per ton per mile of road per annum.....	cents..	47.92
Pay per mile run	do...	10.02
Rate of pay allowed per mile per annum.....		\$150

"I have thought it necessary to give the foregoing illustrations in order that the practice of this department under the law cited may readily appear, and I will thank you to advise me whether that practice is in compliance with or in violation of the statute.

"If not in conformity with the law, will you please indicate the correct method by which the average weight per day should be obtained and the compensation adjusted thereon?

"Very respectfully,

"FRANK HATTON,

"Postmaster General.

"Hon. B. H. Brewster, Attorney General, Department of Justice."

In reply, the Acting Attorney General gave his opinion as below:

"Department of Justice,

"Washington, October 31, 1884.

"The Postmaster General.

"SIR: I have considered your communication of the 22d instant requesting to know whether the construction placed by the Post Office Department on section 4002, subsection 2, prescribing the

mode in which the average of the weight of mails transported on railroad routes shall be ascertained is correct, and am of the opinion that that construction is correct, and that a departure from it would defeat the intention of the law and cause no little embarrassment.

"I have the honor to be, your obedient servant,

"WM. A. MAURY,
"Acting Attorney General."

This Order No 44 was thereafter, in January, 1885, revoked, and no weighings having occurred in the meantime, it never had any practical operation or result.

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VII.

What is called "A documentary history of the Railway Mail Service from its origin in 1834 to the present time," prepared by the general superintendent of the Railway Mail Service, was transmitted to the Senate with a letter by the Postmaster General on January 21, 1885, in compliance with a resolution of the Senate, and among other things said document refers to the method of obtaining the weights of mail carried. Said document was printed as Senate Executive Document 40, Forty-eighth Congress, second session.

VIII.

The act of March 3, 1905, 33 Stat. L., 1088, changes the minimum weighing period provided by the act of 1873 so as to require the inclusion of at least 90 instead of at least 30 successive working days. (See Appendix.)

The Post Office appropriation bill for the fiscal year ending June 30, 1906, as reported to the House of Representatives by its Committee on the Post Offices and Post Roads, contained the following:

"For inland transportation by railroad routes * * * \$40,900,000. Provided, That hereafter before making the readjustment of pay for the transportation of mails on railroad routes, the Postmaster General shall have the mails on such routes weighed, and the average weight per day ascertained for a period of not less than three consecutive months."

Said proviso was stricken out in the House of Representatives and the following was adopted in lieu thereof and became a part of the act approved March 3, 1905:

"Provided, That hereafter before making the readjustment of pay for transportation of mails on railroad routes, the average weight shall be ascertained by actual weighing of the mails for such a number of successive working days, not less than ninety, at such times after June thirtieth, nineteen hundred and five, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct." (See Cong. Rec., 58th Cong., 3d sess., p. 1744.)

In the administration of said act the Postmaster General made no change in the said system of weighing the mails theretofore adopted,

except to weigh the mails for a period of 105 days instead of for a period of 35 days, and to use as a divisor 90 instead of 30 to ascertain the average weight, until the issuance of Order No. 412, set forth in Finding XI.

IX.

Subsequent to said act of March 3, 1905, the Post Office Department adopted and used in connection with the so-called "Distance Circular" hereinbefore described a form of notice respecting the compensation fixed for service in carrying the mails on the various railroad postal routes, which (omitting headings, address, and titles) was and is as follows, to wit:

"The compensation for the transportation of mails, etc., on Route No. —, between — and —, has been fixed from July 1, 31 190—, to June 30, 190— (unless otherwise ordered), under acts of March 3, 1873, July 13, 1876, June 17, 1878, and March 3, 1905, upon returns showing the amount and character of the service for — successive working days, commencing — —, 190—, at the rate of \$— per annum, being \$— per mile for — miles.

"This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week."

X.

At the second session of the Fifty-ninth Congress the Committee on Post Offices and Post Roads of the House of Representatives reported out a bill making appropriations for expenses for the Post Office Department for the fiscal year ending June 30, 1908, and the same became law on March 2, 1907. As reported out said bill contained, among other things, the following:

"Provided, That hereafter the average weight per day be ascertained, in every case by the actual weighing of the mails for such a number of successive days, not less than one hundred and five, at such times and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

The bill was accompanied by a report of said committee which explained the construction and practice followed under said previous acts of Congress, in weighing of the mails, and stated that the purpose of above-quoted provision was to change the method of ascertaining the daily average weights by requiring that all of the days in the weighing period should be included in the divisor. There was extensive debate upon said provision in the Committee of the Whole House on the state of the Union, in which the chairman of said committee and other Members of the House stated and discussed the history, hereinbefore narrated, of the existing practice of including the secular days only in the divisor of weights. Before action was had on said provision a motion was made to amend the bill by insert-

ing the following proviso, referring to the sum appropriated for the Railway Mail Service:

"Provided, That no part of this sum shall be expended in payment for transportation of the mails by railroad routes where the average weight of mails per day has been computed by the use of a divisor less than the whole number of days such mails have been weighed."

A point of order was made against this amendment on the ground that it changed existing law, and the chair sustained the point, observing:

"The existing law has received a construction by the officers charged with the duty of administering it, and that construction the chair feels bound to follow. The proposed amendment changes existing law as construed by the proper officer by changing the divisor.

* * * It has been held further that while limitation may provide that a part of an appropriation shall not be used except in a certain way, yet the restriction of executive discretion may not go to the extent of new duties. And the limitation on the discretion exercised under the law by a bureau of the Government is a change of existing law."

32 Upon appeal from the decision of the chair, its ruling was sustained.

Another amendment was then offered, as follows:

"Provided, That no part of this sum shall be expended in payment for transportation of the mails by railroad routes where the average weight of mails per day has been computed by the use of a divisor less than the whole number of working days such mails have been weighed; and

"Provided further, That the words 'working days' shall be construed to mean days upon which work in the transportation of the mails by railroad routes is performed."

This amendment was also rejected after debate, and the provision reported by the Committee on Post Offices and Post Roads was then stricken out. Thereafter an amendment was offered by the chairman of said committee, and adopted by the House as follows:

"The Postmaster General is hereby authorized and directed to readjust the compensation to be paid from and after the first day of July, nineteen hundred and seven, for the transportation of mail on railroad routes carrying their whole length an average weight of mail per day of upward of five thousand pounds by making the following changes in the present rates per mile per annum for the transportation of mail on such routes, and hereafter the rates on such routes shall be as follows:

"On routes carrying their whole length an average weight of mail per day of more than five thousand pounds and less than forty-eight thousand pounds the rate shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds, and on routes carrying their whole length an average weight of mail per day of more than forty-eight thousand pounds the rates shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds up to forty-eight thousand pounds, and for

each additional two thousand pounds in excess of forty-eight thousand pounds at the rate of nineteen dollars and twenty-four cents upon all roads other than land-grant roads, and upon all land-grant roads the rate shall be seventeen dollars and ten cents for each two thousand pounds carried in excess of said forty-eight thousand pounds."

As so amended the bill was passed by the House and went to the Senate.

When it had been reported out by the Senate Committee on Post Offices and Post Roads an amendment was offered from the floor in the identical language of the above amendment first rejected by the House. Said amendment was not debated nor explained, but was adopted by the Senate. The bill was then sent to a conference on part of the two Houses. In the conference objection was made on the part of the House of Representatives to said Senate amendment, and the committees of conference in their reports recommended that the Senate recede from the same, which it did, and the two Houses adopted said reports and passed the bill with said amendment stricken out, but containing the provision last above quoted.

When offering said provision in above form, and as it was enacted into law, the chairman of the House Committee on Post
33 Offices and Post Roads pointed out that the then pending bill had carried four distinct reductions (including the three carried in the provision hereinbefore set out) in the compensation of railway mail carriers, and explained that two of said four reductions, viz, that carried by the amendment he was offering and one other relative to pay for post-office cars, had been selected as those which the House apparently preferred to adopt.

XI.

Thereafter the Postmaster General, on March 2, 1907, and June 7, 1907, respectively, issued orders as follows:

"Order No. 165. That when the weight of mail is taken on railroad routes the whole number of days the mails are weighed shall be used as a divisor for obtaining the average weight per day.

"Order No. 412. Ordered, That Order 165, dated March 2, 1907, be, and the same is hereby, amended to read as follows:

"That when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day."

In accordance with the last-named order for all weighings and readjustments made subsequent to its promulgation, the Postmaster General weighed the mails on railroad routes for 105 days and divided the aggregate weight by 105, and the readjustments were made on the average weight per day so computed, and the plaintiff company was paid accordingly.

Thereafter the Postmaster General submitted to the Attorney General the order No. 412 for an opinion as to its legality, and the

Attorney General, under date of September 27, 1907, rendered an opinion sustaining the legality of said order. (26 A. G. Op., 390.)

XII.

From 1873, to and including all the times hereinafter specified, plaintiff possessed and operated over certain lines of railway between Boston, Mass., and Albany, N. Y., Railway Mail Service Route No. 104025. During the period July 1, 1909, to and including June 30, 1911, the title of the company (plaintiff herein) operating said route was stated as New York Central and Hudson River Railroad Company, but effective July 1, 1911, the title thereto was changed with consent of the Postmaster General so as to read Boston and Albany Railroad (N. Y. C. & H. R. R. Co., Lessee).

The quadrennial term for which readjustments had been made on the routes of the plaintiff operated on June 30, 1909, as set forth in Finding I hereof, expired by limitation on that day. The Postmaster General, on August 17, 1908, wrote and plaintiff received the following letter:

"Post Office Department,

"Office of the Second Assistant Postmaster General,

"Division of Railway Adjustments.

"Washington, D. C., August 17, 1908.

"Sir: The General Superintendent, Division of Railway Mail Service, has been directed to weigh the mails carried on route
34 No. 104025, between Boston, Mass., and Albany, N. Y., for not less than ninety successive working days, commencing August 26, 1908, for the purpose of obtaining the data upon which the department may adjust the pay for mail service on the route (in accordance with the several acts of Congress governing the same), from July 1, 1909, to June 30, 1913.

"The law requires that the weighing be done by sworn employees of the Post Office Department, and all Post Office Department employees will be instructed to take every precaution to secure correct weights, to provide against all irregularities, and to prevent any diversion of the mails from their usual channels during said weighing.

"This office, through the Superintendent Railway Mail Service for the division in which your road is located, will advise your company relative to the requirements of the department in connection with said weighing.

A distance circular for this route is forwarded herewith and you are requested to see that special care is given to the accurate filling of such circular in accordance with the instructions printed thereon, and that it be returned to this office as promptly as possible. Please cause to be forwarded with the circular when it is returned two copies of your latest working schedule.

In connection with the readjustment to be made on this weighing of the mails, your attention is called to the Postmaster General's order No. 412, of June, 1907, which reads as follows:

'That when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day.'

Very respectfully,

JOHN W. HOLLYDAY,

Acting Second Assistant Postmaster General.

Messrs. Thompson & Slater, Agents New York Central & Hudson River Railroad Co., Washington, D. C."

The distance circular therein referred to was the usual distance circular, sometimes called Form 2504, before described, and contained the customary acceptance clause, before quoted, for signature of plaintiff's president or general manager. Plaintiff returned said distance circular with all blanks and verification appropriately filled in except the blank pertaining to the acceptance clause which it did not fill in nor sign, but appended thereto a form of acceptance clause bearing date of November 24, 1908, signed by its president, and reading as follows:

"The company named below agrees to accept and perform mail service upon the conditions prescribed by law and existing regulations of the department applicable to railroad mail service excepting order No. 412, issued by the Postmaster General, June 7, 1907. This company can not accept as full compensation for services rendered the amount fixed according to the method of computation of average weight prescribed by said order, and reserves the right to insist on payment according to the method of computing the
35 average weight applied by the department prior to the issuance of order No. 165, issued by the Postmaster General, March 2, 1907."

January 5, 1909, the Second Assistant Postmaster General acknowledged receipt of said distance circular and accompanying proposed acceptance, saying:

"This office is in receipt of your letter of January 2, accompanied by distance circulars covering the following routes:

"104025, Boston, Mass., to Albany, N. Y.; * * * all being for the term beginning July 1, 1909, and ending June 30, 1913.

"Note is taken of the modification made by you in the agreement clause, in which you except order No. 165, issued by the Postmaster General March 2, 1907, and order No. 412, issued by the Postmaster General June 7, 1907, and otherwise agree to perform service under existing regulations. In regard to this I have to advise you that the department will not enter into contract with any railroad company by which it may be excepted from the operation or effect of any postal law or regulation, and it must be understood that, in the performance of service, from the beginning of the contract term above named and during the continuance of such performance of service, your company will be subject, as in the past, to all the

postal laws and regulations which are now or may become applicable during the term to this service."

To said letter of January 5, 1909, plaintiff did not reply, but continued to and including June 30, 1909, to transport the mails over each and all of its said routes under the then current contracts before described, and has been paid in full for so doing. Without further correspondence than as above set forth between the Postmaster General, or any one acting for or on his behalf, and plaintiff, the Postmaster General, beginning July 1, 1909, and each and every day thereafter to and including June 30, 1913, caused the mails for transportation over each and all of said above specified routes to be delivered to plaintiff at its several receiving stations, and same was received and appropriately transported by plaintiff.

Subsequent to July 1, 1907, plaintiff received from the Postmaster General a communication reading as follows:

"Post Office Department,
Second Assistant Postmaster General,

Washington, July 1, 1909.

SIR: The compensation for the transportation of mails, etc., on route No. 104025, between Boston, Mass., and Albany, N. Y., has been fixed from July 1, 1909, to June 30, 1913 (unless otherwise ordered), under acts of March 3, 1873, July 12, 1876, June 17, 1878, March 3, 1905, and March 2, 1907, upon returns showing the amount and character of the service for a number of successive working days not less than 90, commencing August 26, 1908, at the rate of \$305,253.67 per annum, being \$1,523.45 per mile for 200.37 miles. * * *

This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week."

36 Subsequently plaintiff likewise received from the same source a railway mail pay order relating to service upon and over route 104025 in the form following, to wit:

"Washington, D. C.,

"Wednesday, July 7, 1909,

"I hereby approve the following orders and regulations, originating claims and affecting the accounts of the Post Office Department and Postal Service in the following divisions:

* * * * *

"Second Assistant Postmaster General,
 "Entire bureau, July 1, 1909.

* * * * *

"C. P. GRANDFIELD,
 "Acting Postmaster General.

* * * * *

"Order No. B13067.

"Route No. 104025.

"Mass., Boston, Mass., and Albany, N. Y., 200.37 miles, 124.21 t. a. w., New York Central and Hudson River Railroad Co., a. d. w. 143,314 lbs.

"From July 1, 1909, to June 30, 1913, pay the New York Central and Hudson River Railroad Company, monthly, for the transportation of the mails between Boston, Mass., and Albany, N. Y., at the rate of \$305,253.67 per annum, being \$1,523.45 per mile for 200.37 miles. * * *

"This adjustment is subject to future orders and to fines and deductions and is based on a service of not less than six round trips per week."

Similar communications and orders were issued and received by plaintiff subsequent to July 1, 1907, concerning each of its other routes above specified, whereon the term of plaintiff's service began July 1, 1909.

XIII.

In obtaining the annual compensation stated in the foregoing order the Postmaster General had caused the mails as transported over each of said routes to be weighed for 105 successive days in each instance where said mails were carried every day in the week, including Sundays, and on 90 successive working days during such period of 105 days on routes where the mails were carried but six days in each week and not carried on Sundays, and in each and every instance had caused the aggregate total of the weights so ascertained to be divided by 105, being the total number of days included in the weighing period, as prescribed by order No. 412. From the quotient in each case and the maximum rate of compensation allowed by the act of 1873 and the reductions which were prescribed, respectively, by said acts of July 12, 1876, June 17, 1878, and March 2, 1907, and the mileage involved, the adjustment of compensation was effected. Rates are illustrated by the following table:

37 Transportation of Mails by Railroads—Table of Maximum Rates of Pay for Railroad Mail Service.

The maximum compensation for general railroad mail service and for service over land-grant railroads is shown in the following table:

(1)	Pay per mile per annum.			
	(2)	(3)	(4)	(5)
Average weight of mails per day carried over whole length of route.	Rates allowable under sec. 4002, R. S. (act of Mar. 3, 1873).	Rates allowable under acts of July 12, 1876, June 17, 1878, and Mar. 2, 1907 (see note 1).	Rates allowable to land-grant railroads under acts of July 12, 1876, June 17, 1878, Mar. 2, 1907, and May 12, 1910 (see notes 1 and 2).	Intermediate weight warranting allowance of \$1 per mile under the law of 1873 and the practice of the department, subject to acts of July 12, 1876, June 17, 1878, and Mar. 2, 1907 (see note 1).
				Pounds.
200 pounds	\$50.00	\$42.75	\$34.20	..
200 to 500 pounds.....				12
500 pounds	75.00	64.12	51.30	..
500 to 1,000 pounds.....				20
1,000 pounds	100.00	85.50	68.40	..
1,000 to 1,500 pounds...				20
1,500 pounds	125.00	106.87	85.50	..
1,500 to 2,000 pounds...				20
2,000 pounds	150.00	128.25	102.60	..
2,000 to 3,500 pounds...				60
3,500 pounds	175.00	149.62	119.70	..
3,500 to 5,000 pounds...				60
5,000 pounds	200.00	171.00	136.80	..
For each additional 2,000 pounds above 5,000 and less than 48,000 pounds	25.00	20.30+	16.24+	..
Above 5,000 and less than 48,000 pounds				80
For each additional 2,000 pounds in excess of 48,000 pounds	25.00	19.24	15.39	..
				Character of route.
				Nonland-grant. Land-grant.
				Pounds. Pounds.
Intermediate weight above 48,000 pounds warranting addition of \$1, net.....			103.96	129.96

No allowance is made for weights not justifying the addition of \$1.

NOTE 1.—The act of Mar. 2, 1907, affects only routes carrying over 5,000 pounds.

NOTE 2.—The act of May 12, 1910, affects only land-grant routes carrying over 48,000 pounds.

XIV.

The plaintiff continued to carry the mails of the United States from and after the 1st day of July, 1907, on its respective routes, as hereinbefore set forth, and has been paid for the service at the rates of compensation stated by such orders.

XV.

38 The act making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1909, as reported to the House by the committee, contained no reference to the matter of weighings of the mails or to the question of the divisor. While in the Committee of the Whole an amendment was offered providing in effect that not exceeding six-sevenths of the amount payable under the orders adjusting pay in the two contract sections to which order 412 had not been applied should be paid out of the appropriation thereby made until such adjustment should have been made in accordance with order 412, or until it should have been finally determined by law that the first or then existing adjustment was binding upon the Government notwithstanding any error or wrong in the basis of such ascertainment. A point of order was raised on this in the House, and the chairman of the Committee of the Whole overruled it, and the amendment was agreed to. The bill with the amendment was passed by the House and sent to the Senate. It was reported from the Senate Committee on Post Offices and Post Roads to the Senate with a substitute amendment for the one passed by the House, which substitute amendment, among other things, provided that the whole number of days included in the weighing period shall be used as a divisor for obtaining the average daily weight. A point of order was raised on this in the Senate and the president of the Senate overruled it, and then the amendment was agreed to. The bill with the amendment was passed by the Senate. A slight change was made by the conferees of the Senate and the House, and their agreement was reported to their respective bodies. The House, however, refused to adopt the Senate amendment and the Senate receded, and the provision failed of enactment. In the discussion of the bill in the Senate the active member of the committee in explaining the bill stated that the provision was intended to crystallize into law the requirement that seven days instead of six shall be used as the divisor in determining the amount due the railroad companies, and the chairman of the committee in the House declared that the provision "makes permanent law what is now known as the divisor. It is now but a department official order, subject to change or repeal by any subsequent official in control of the department. By making it permanent law we avoid that possibility."

In the annual reports for the fiscal year 1907 and following years the Post Office Department stated its estimates of expenses for transportation by railroad routes, which estimates were calculated upon

the application of the new divisor in so far as the same had been applied from year to year. These reports reached Congress through the usual channels of transmission. The report for 1907 stated that the railroad companies were dissatisfied with the order and had modified their distance circulars by excepting to it. Congress made the appropriations as submitted by the department. The reports for 1910 and succeeding years further stated that the railroad companies protested against the use of the new divisor, and that suits had been filed calling into question its validity. In submitting its estimates for appropriations for the years mentioned the department prepared them upon the basis of the application of order 412 in so far as it had been applied from year to year, and Congress made appropriations based thereon.

39

XVI.

The plaintiff has received monthly or quarterly payments, based upon said computation and readjustments, at or about the end of each month or quarter's service, and the payments were received without objection or protest of any kind.

XVII.

Reference is made to the several reports of the Postmasters General for the years 1867 to 1914, inclusive; to Preliminary Report and Hearings relative to Railway Mail Pay before Joint Committee of Congress, January, 1913, to April, 1914, pages 1023, 1024; also to the acts of Congress appearing in the appendix to these findings.

XVIII.

If instead of using a divisor of 105 there had been used a divisor of 90, and to the average weights thus found the maximum rates allowed by law be applied, the difference between the amount so resulting and what was paid plaintiff is \$1,257,630.36.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that plaintiff is not entitled to recover, and its petition is accordingly dismissed. (See opinion and concurring opinions filed herewith in cases Nos. 31227, 31304, and 32852.)

40

V. *Appendix.*

Act of 1873.

The act of March 3, 1873, 17 Stat. L., 558, appropriates for the service of the Post Office Department "out of any moneys in the Treasury arising from the revenues of said department, in conformity to the act of July second, eighteen hundred and thirty-six"

(5 Stats., 80), "For inland mail transportation, fourteen million eight hundred and forty thousand and twenty dollars," and makes appropriations for messengers, route agents, mail-route messengers, local agents, letter carriers, etc., and then follows:

"For increase of compensation for the transportation of mails on railroad routes upon the condition and at the rates hereinafter mentioned, five hundred thousand dollars, or so much thereof as may be necessary; Provided, That the Postmaster General be, and he is hereby, authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned, to wit, that the mails shall be conveyed with due frequency and speed; that sufficient and suitable room, fixtures, and furniture, in a car or apartment properly lighted and warmed, shall be provided for route agents to accompany and distribute the mails; and that the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars; five hundred pounds, seventy-five dollars; one thousand pounds, one hundred dollars; one thousand five hundred pounds, one hundred and twenty-five dollars; two thousand pounds, one hundred and fifty dollars; three thousand five hundred pounds, one hundred and seventy-five dollars; five thousand pounds, two hundred dollars, and twenty-five dollars additional for every additional two thousand pounds, the average weight to be ascertained in every case by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times, after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct; Provided also, That in case any railroad company now furnishing railway post-office cars shall refuse to provide such cars, such company shall not be entitled to any increase of compensation under any provision of this act: Provided further, That additional pay may be allowed for every line comprising a daily trip each way of railway post-office cars, at a rate not exceeding twenty-five dollars per mile per annum for cars forty feet in length; and thirty dollars per mile per annum for forty-five feet cars; and forty dollars per mile per annum for fifty feet cars; and fifty dollars per mile per annum for fifty-five feet to sixty feet cars: And provided also,

41 That the length of cars required for such post-office railway-car service shall be determined by the Post Office Department, and all such cars shall be properly fitted up, furnished, warmed, and lighted for the accommodation of clerks to accompany and distribute the mails: And provided further, That so much of section two hundred and sixty-five of the act approved June eighth, eighteen hundred and seventy-two, entitled 'An act to revise, consolidate, and amend the statutes relating to the Post Office Department,' as provides that 'the Postmaster General may allow any railroad company with whom he may contract for the carrying of the United States mail, and who furnish railway post-office cars for the transportation

of the mail, such additional compensation beyond that now allowed by law as he may think fit, not exceeding, however, fifty per centum of the said rates, be, and the same is hereby, repealed."

Act of 1875.

The act of March 3, 1875, 18 Stat. L., 341, appropriates \$17,548,000 for inland mail transportation.

"And out of the appropriation for inland mail transportation the Postmaster General is authorized hereafter to pay the expenses of taking the weights of mails on railroad routes, as provided by the act entitled 'An act making appropriations for the service of the Post Office Department for the year ending June thirtieth, eighteen hundred and seventy-four,' approved March third, eighteen hundred and seventy-three; and he is hereby directed to have the mails weighed as often as now provided by law by the employees of the Post Office Department, and have the weights stated and verified to him by said employees under such instructions as he may consider just to the Post Office Department and the railroad companies."

Act of 1876.

The act of July 12, 1876, 19 Stats., 79, appropriates for inland mail transportation, separating other than railroad routes from the latter, and—

"For transportation by railroad one million one hundred thousand dollars: Provided, That the Postmaster General be, and he is hereby, authorized and directed to readjust the compensation to be paid from and after the first day of July, eighteen hundred and seventy-six, for transportation of mails on railroad routes by reducing the compensation to all railroad companies for the transportation of mails ten per centum per annum from the rates fixed and allowed by the first section of an act entitled 'An act making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, eighteen hundred and seventy-four, and for other purposes,' approved March third, eighteen hundred and seventy-three, for the transportation of mails on the basis of the average weight. And the President of the United States is hereby authorized to appoint a commission of three skilled and competent persons, who shall examine into the subject of transportation of the mails by railroad companies, and report to Congress at the commencement of its next session such rules and regulations for such transportation and rates of compensation therefor as shall in their opinion be just and
 42 expedient, and enable the department to fulfill the required and necessary service for the public. And to defray the expense of said commission the sum of ten thousand dollars is hereby appropriated out of any money in the Treasury not otherwise appropriated."

Act of 1877.

By the act approved March 3, 1877, 19 Stats., 385, this commission was continued.

Act of 1878.

The act of June 17, 1878, 20 Stats., 142, appropriates—

"For transportation by railroad, nine million one hundred thousand dollars; * * * And provided further, That the Postmaster General be, and he is hereby, authorized and directed to readjust the compensation to be paid from and after the first day of July, eighteen hundred and seventy-eight, for transportation of mails on railroad routes by reducing the compensation to all railroad companies for the transportation of mails five per centum per annum from the rates for the transportation of mails, on the basis of the average weight fixed and allowed by the first section of an act entitled 'An act making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, eighteen hundred and seventy-seven, and for other purposes,' approved July twelfth, eighteen hundred and seventy-six."

Act of 1905.

The act of March 3, 1905, 33 Stats., 1088, appropriates for inland transportation by railroad routes \$40,900,000, of which \$120,000 may be employed for other purposes mentioned—

"Provided, That hereafter before making the readjustment of pay for transportation of mails on railroad routes, the average weight shall be ascertained by the actual weighing of the mails for such a number of successive working days not less than ninety, at such times after June thirtieth, nineteen hundred and five, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

Act of 1906.

The act of Congress approved June 26, 1906, 34 Stats., 467, 472, 473, appropriated \$43,000,000 for inland transportation by railroad routes for the fiscal year ending June 30, 1907, and provided:

"That the Postmaster General shall require all railroads carrying the mails under contract to comply with the terms of said contract as to time of arrival and departure of said mails, and it shall be his duty to impose and collect reasonable fines for delay, when such delay is not caused by unavoidable accidents or conditions."

Act of 1907.

The act of March 2, 1907, 34 Stats., 1212, appropriates—

"For inland transportation by railroad routes, forty-four million six hundred and sixty thousand dollars.

43 "The Postmaster General is hereby authorized and directed to readjust the compensation to be paid from and after the first day of July, nineteen hundred and seven, for the transportation of mail on railroad routes carrying their whole length an average weight of mails per day of upward of five thousand pounds by making the following changes in the present rates per mile per annum for the transportation of mail on such routes, and hereafter the rates on such routes shall be as follows: On routes carrying their whole length an average weight of mail per day of more than five thousand pounds and less than forty-eight thousand pounds the rate shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds; and on routes carrying their whole length an average weight of mail per day of more than forty-eight thousand pounds the rate shall be five per centum less than the present rate on all weight carried in excess of five thousand pounds up to forty-eight thousand pounds, and for each additional two thousand pounds in excess of forty-eight thousand pounds at the rate of nineteen dollars and twenty-four cents upon all roads other than land-grant roads, and upon all land-grant roads the rate shall be seventeen dollars and ten cents for each two thousand pounds carried in excess of said forty-eight thousand pounds."

44 VI. *Opinion of the Court by Campbell, Ch. J., and Concurring Opinions by Booth, J.; Barney, J.; Downey, J., and Hay, J., Decided March 11, 1918.*

KANSAS CITY, MEXICO AND ORIENT RAILWAY COMPANY OF TEXAS
v.

THE UNITED STATES.

THE NORTHERN PACIFIC RAILWAY COMPANY

v.

THE UNITED STATES.

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY

v.

THE UNITED STATES.

THE SEABOARD AIR LINE RAILWAY COMPANY

v.

THE UNITED STATES.

Divisor Cases.

Opinion.

CAMPBELL, Chief Justice, delivered the opinion of the court:

These suits were brought to recover compensation for mail transportation alleged to be due the parties respectively, and have been

heard together. A large number of similar cases were taken upon submission when these were heard. The questions involved are substantially the same as those in *Chicago & Alton R. R. Co.*, 49 C. Cls., 463, and *Yazoo & Mississippi Valley R. R. Co.*, 50 C. Cls., 15. The two latter cases were appealed to the Supreme Court, where they were affirmed by an equally divided court. That ruling is not an authority for the determination of other cases. *Hertz v. Woodman*, 218 U. S., 205. It does not follow, however, that the decisions of this court must be ignored by the court itself when similar cases are again presented. The court should have some regard for its own decisions, and in class cases where though the plaintiffs can not appeal or where the defendants do not appeal the court adheres to its ruling and refuses to reconsider cases subsequently presented that are governed by the former decisions. These considerations could very well justify the court's disposition of the instant cases without an opinion. The plaintiffs, however, are entitled to findings of fact because the amounts claimed are sufficient to authorize appeals. It was therefore decided to hear the parties again in argument, and certain typical cases have been prepared with the view to presenting all of the questions that it is supposed can arise in these so-called divisor cases. The plaintiffs' attorneys have accordingly been heard in extended oral argument and they have filed able and extensive briefs. They have probably left nothing unsaid that would tend either to elucidate the questions involved or to show the right of plaintiffs to recover.

45 As we adhere to the conclusion that the petitions should be dismissed, we will deal more at length with the cases than would be done by the mere announcement of a conclusion of law. There are some differences in the cases, but we think they can all be disposed of in one opinion.

These suits were brought in the years 1911, 1912, 1913, and 1914, respectively. In some of them objection was made to Order 412 hereafter mentioned; in some of them no objection to the order was made. To each of the objections reply was made by the Postmaster General to the effect that no contract would be made which excluded a full observance of the rules and regulations, and at that time Order 412 had been promulgated. The respective adjustment notices which later followed had not been issued; all of the plaintiffs received and transported the mails and were paid therefor periodically according to the terms of Order 412 and the readjustment notices issued by the Postmaster General and without objection or protest when payments were accepted.

The objections or exceptions to Order 412 were general. There was no separate objection based upon a supposed injustice to 6-day routes. The contracts were with the different plaintiffs who operated both classes of routes and contracted for both alike.

The claims may be classified as being (1) claims of what are called 6-day routes, (2) claims of 7-day routes, (3) claims of a railroad on parts of whose line are routes affected by the land-grant act.

An illustration of the claims asserted by some 7-day routes under a supposed implied contract may be taken from a typical route as follows: The mails were actually weighed on the route for 105 days,

which included 15 Sundays. The total of the 105 weighings (making the dividend) was divided by 105, and the daily average weight was found to be 143,314 pounds. The maximum statutory rates were applied, and the annual compensation was ascertained to be \$305,253.67. This sum was paid in monthly installments, which, as they severally matured, were received by the carrier without objection of any kind.

If instead of using 105 as the divisor 90 had been used, the daily average weight would have been 167,199 instead of 143,314 as actually found.

Assuming that the actual average weight found by 105 as the divisor fairly represented the actual weight carried each day throughout the year, it would appear that on said route there was actually transported during the year of 365 days something over fifty-two million (52,000,000) pounds of mail, whereas if 90 had been used as the divisor the carrier would have been credited with transporting during the year about sixty-one million pounds, making a difference between what was thus actually carried and what by the use of the divisor 90 would appear to have been carried of about nine million pounds of mail. If the basis adopted was 313 days per year the difference in the weights under like computations would be approximately seven and a half million pounds. The difference between what the carrier was paid and what it would have received if its

46 compensation had been based upon the result of using 90 as the divisor and the maximum rate would have been about \$46,000 per year. This amount for each of the years in suit is claimed. The actual weight of the mails carried during the year is not shown except by taking the actual average weight per day found as above and multiplying it by 313 or 365 days. The actual weight can not be approximated otherwise.

The action is based upon contract, and plaintiff, denying there was an express contract, relies upon implied contract for recovery as upon quantum meruit. It has been paid the maximum rates provided by law for the average weight of mails actually carried. Can it recover under an implied contract as upon quantum meruit for the nine million pounds of mail which it did not in fact carry and thereby receive \$46,000 per year additional to what it has received?

A contention advanced, however, by plaintiffs is that the law required the use of a "divisor of 90."

Two propositions may be regarded as settled:

(1) That the railroad companies were until the act of July, 1916, free to accept or refuse the terms proposed by the Postmaster General for the transportation of mails. Thus it was held in *Alabama Great Southern Railroad case*, 25 C. Cls., 30, 41, decided in 1889, in an opinion by Judge Nott, that railroads other than land-grant roads "are under no obligation to the Government to carry the mail and may decline the service if they will, but that if they do perform, it must be upon the terms and conditions prescribed by the statutes and regulations of the Post Office Department or under an express contract within the limitations imposed by law." This case was affirmed by the Supreme Court, 142 U. S., 615.

In *Eastern Railroad Company*, 129 U. S., 391, 395, it is said:

"After the first of July, 1877, the company was under no legal obligation to carry the mails. * * * We do not mean that the railroad company was bound to continue the carrying of the mails, if subsequent changes in the rates were unreasonable or did not meet with its assent. On the contrary, it was at liberty, when the five per cent reduction was made, to discontinue their transportation on its cars."

In *Chicago, Milwaukee & St. Paul Railway Company*, 198 U. S., 385, 389, it is said:

"A contract may not be forced upon a railway. It may accept, however, and become bound by the action of the Post Office Department."

To the same effect is *Minneapolis & St. Louis Railway Company*, 24 C. Cls., 350, and *Texas & Pacific Railway Company*, 28 C. Cls., 379.

In *L. & N. Railroad Company*, 46 C. Cls., 267, 277, it was declared that the Post Office Department had no authority to compel the company to transport the mail upon terms to which it had not agreed. *Delaware, L. & W. Case*, 51 C. Cls., 426.

(2) The rates stated in the statutes were maximum rates.

After the amendatory acts of 1876 and 1878 herein mentioned were passed a suit was brought in this court involving the construction of said acts, and in the opinion delivered by Judge Richardson (*Eastern Railroad Company Case*, 20 C. Cls., 23, 41) it was said:

"Section 4002 of the Revised Statutes, from the act of 1873, does not establish an absolute rate of compensation, necessarily alike to all railroads, for mail transportation, but fixes maximums which are not to be exceeded, leaving the Postmaster General a discretion to make contracts at less rates if he should be able to do so. On that point the language of the section is clear—'the pay per mile shall not exceed the following rates.' It is urged that this language is controlled by the preceding words of the section, 'The Postmaster General is authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned.' In our opinion the rates there referred to are any rates which the Postmaster General may contract for, not exceeding those thereafter mentioned."

This case was decided January 12, 1885, and upon appeal was affirmed by the Supreme Court February 4, 1889, 129 U. S., 391, 395. In the Supreme Court's opinion, delivered by Mr. Justice Harlan, it is said:

"After the first of July, 1877, the company was under no legal obligation to carry the mails. It carried them after that date under an implied contract that it should receive such compensation as was reasonable, not exceeding the maximum rates prescribed by Congress, and subject to a readjustment of rates as required by the act of 1876."

Again, in 1889, this court, speaking through Chief Justice Richardson, in *Minn. & St. L. Ry. Co. Case*, 24 C. Cls., 350, said (p. 361):

"In the *Eastern Railroad Case* (20 C. Cls., R. 41), affirmed on

appeal (129 U. S., 391), we held that the statute (Rev. Stat., §4002) did not fix the exact amount to be allowed to railroads, but only the maximum which the Postmaster General could not exceed, leaving to him a discretion to make contracts in his own way at less rates if he should be able to do so."

And again, in 1893, in the Texas & Pac. Ry. Co. Case, 28 C. Cls., 379, it was said (p. 389):

"It seems to be assumed by the claimant that the statutes fix an absolute rate of compensation, while in point of fact they fix only the maximum below which the Postmaster General is authorized to make such contracts as he deems the needs of the mail service may justify."

In A. G. S. R. R. Co. case, 25 C. Cls., 30, 43, decided in 1889, this court, speaking through Judge Nott, and with reference to the portions of a railroad that were land-aided, said:

"But as to these latter portions of the road it was unquestionably within the power of Congress to set a limitation upon the price which should be paid for such service, and thereby to leave the public agent, the Postmaster General, without authority to bind the defendants for any greater price, either by entering into an express contract or by accepting the claimant's services without one; and it was equally within the discretion of Congress to fix different rates for different roads or classes of roads, and in so doing to say that if part of a mail carrier's line was a land-grant road the remainder of the line should be restricted to the same compensation. Such a restriction would not bind the carrier to carry the mail, but it would bind the Postmaster General not to incur a greater liability, and would be notice to the road at what point his authority to bind the Government by contract terminated."

48 In Jacksonville, Pensacola & Mobile R. R. Co. case, 21 C. Cls., 155, decided in 1886, and affirmed by the Supreme Court (118 U. S., 626), it is recognized that the rates mentioned in the statute are maximum rates.

In A. T. & S. F. Ry. Co. case, 225 U. S., 640, the court construed a provision of the act of March 2, 1907, 34 Stats., 1212, which provides additional pay for railway post-office cars "at a rate not exceeding" designated sums for different lengths of cars. That act was an amendment of section 4004 Revised Statutes in that it changed the maximum rate stated and made some change with reference to the sizes of the cars mentioned in the earlier act. The terms "at a rate not exceeding" are the same in both acts, and section 4004 is in the same language as the second proviso in the act of 1873. The Supreme Court held "The statute defined a car line, but did not fix the compensation. It left that to be determined by the Postmaster General, who could have named any rate not to exceed the statutory maximum." If the language of said proviso to the act of 1873 only fixed a maximum rate, it is difficult to see how the language in the same statute that the pay per mile per annum "shall not exceed the following rates" is to be given a different meaning.

That the rates were "specified maximum rates" was recognized by the Supreme Court as early as 1881 in Chicago & N. W. Ry. Co.,

104 U. S., 680, 683. That they were maximum rates is declared by Revised Statutes, section 3999, providing for the contingency that the Postmaster General may not be able to contract within the prescribed maximum rates.

We think it is too late to question the rule stated.

First. It is said in one of the briefs for plaintiffs, speaking of the act of March 3, 1873, 17 Stats., 558, that it "plays the most important part in this case." But that act is not to be considered independently of the balance of the law when we come to construe its meaning.

The act of June 8, 1872, 17 Stats., 283, entitled "An Act to revise, consolidate, and amend the Statutes relating to the Post Office Department," deals comprehensively, as its title imports, with the powers, duties, and responsibilities of that department. It was referred to in the opinion of this court in the Chicago & Alton case and we now mention some of its provisions with more particularity. It contains more than 300 sections and embodies the statutory law relating to the Post Office Department, with perhaps a minor exception not material here. By its repealing clause (sec. 327) it repeals "the following acts and parts of acts and resolutions and parts of resolutions," and there follows a list of the acts and resolutions wholly or partly repealed, beginning with section 2 of the act of March 3, 1791, and concluding with the act of April 27, 1872. Included in the repealed statutes are the act of July 2, 1836, 5 Stat., 800, the two acts of March 3, 1845, 5 Stats., 732, 748, and section 8 of the act of March 3, 1845, 5 Stats., 752. It provides for the establishment of "a department to be known as the Post Office Department," the principal officers of which "shall be one Postmaster General and three Assistant Postmasters General," to be appointed by the President, by and with the consent of the Senate. The term of office of the Postmaster General is "for and during the term
49 of the President by whom he is appointed, and for one month thereafter, unless sooner removed."

After prescribing in particular some of the duties of the Postmaster General, the act of 1872 provides (sec. 6) that he shall generally superintend the business of the department and execute all laws relating to the postal service.

By section 388 of the Revised Statutes of 1873 it is provided "That there shall be at the seat of government an executive department to be known as the Post Office Department, and a Postmaster General, who shall be the head thereof."

Among other provisions of the act of 1872 the following appear:

Section 46: "That the money required for the postal service in each year shall be appropriated by law out of the revenues of the service."

Section 210: "That the Postmaster General shall arrange the railway routes on which the mail is carried" * * * "into three classes, according to the size of the mails, the speed at which they are carried, and the frequency and importance of the service, so that each railway company shall receive, as far as practicable, a proportionate and just rate of compensation, according to the service per-

formed." This differs from its predecessor, the act of 1845, in the order of terms and in the introduction of the word "frequency," which did not appear in the act of 1845.

Section 211 provides the maximum pay for the several classes of routes "per mile per annum."

Section 212: "That if the Postmaster General is unable to contract for carrying the mail on any railway route at a compensation not exceeding the maximum rates herein provided, or for what he may deem a reasonable and fair compensation," he may make other arrangements for carrying the mails.

Section 213: "That every railway company carrying the mail shall carry on any train which may run over its road, and without extra charge therefor, all mailable matter directed to be carried thereon, with the person in charge of the same."

Section 214 provides that all railway companies which have been aided by a grant of land or otherwise "shall carry the mail at such prices as Congress may by law provide; and, until such price is fixed by law, the Postmaster General may fix the rate of compensation."

Section 256: "That no contract for carrying the mail shall be made for a longer term than four years, and no contract for carrying the mail on the sea shall be made for a longer term than two years."

Section 265 authorizes the Postmaster General to enter into contracts for carrying the mails with railway companies without advertising for bids therefor, and further authorizes him to allow any railway company "with whom he may contract for the carrying of the United States mail, and who furnish railway post-office cars for the transportation of the mail, such additional compensation beyond that now allowed by law as he may think fit, not exceeding, however, fifty per centum of the said rates."

Section 200: "That all the waters of the United States shall be post roads during the time the mail is carried thereon."

Section 201 provides "That all railways and parts of railways which are now or hereafter may be put in operation are hereby
50 declared to be post roads"; and by sections 202 and 203 canals and plank roads during the time the mail is carried thereon are declared to be post roads.

All of these sections were carried into the revision of 1873 and constitute sections 3997 et seq. and section 3964 and sections 3942 and 3956 of the Revised Statutes. The latter authorizing contracts with railway companies without advertising for bids and declaring that no contract for carrying the mails shall be made for a longer term than four years.

Provision is made (sec. 212, act of 1872; sec. 3999, Rev. Stats.) for the contingency that the Postmaster General may be unable to contract for the carrying of the mail on any railway route at a compensation "not exceeding the maximum rates herein provided, or for what he may deem a reasonable and fair compensation," and he is authorized to contract with others for the service upon the happening of such a contingency. It is manifest that this section, being an authority to a public officer to contract with the railway companies within the maximum rates fixed by the act, "or for what he

may deem a fair and reasonable compensation," was something more than a mere authority conferred on him, because the words just quoted are sufficient, when addressed to a public officer, to impose upon him the duty of exercising his judgment as to the reasonableness and fairness of the compensation which he proposes to pay.

It is not necessary when inquiring into the powers and functions of the Postmaster General under such an act as that of 1872 or the revision of 1873 to find expression in explicit terms of all his rights and powers and duties. An applicable rule in such case, stated in one of the plaintiff's briefs and in the Government's brief as well, is as follows:

"A practical knowledge of the action of any one of the great departments of the government, must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done, that can neither be anticipated nor defined and which are essential to the proper action of the government. Hence, of necessity, usages have been established in every department of the government which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usages can have a retrospective effect, but must be limited to the future." *United States v. Macdaniel*, 7 Pet., 1, 14.

Aside from that rule it is plainly deducible from the terms of the statute that there was devolved upon the Postmaster General the duty of contracting with railway companies on terms within maximum rates and that it required of him the exercise of broad discretion in matters pertaining to the transportation of the mails. In 51 theory at least the expenses of handling the mails by the department were to be borne by its revenues. *Rev. Stat.*, sec. 4054. These were to be covered into the Treasury and the expenses were appropriated for by Congress out of such revenues. From the earliest period the carrying of the mails was under contract, and the act of 1872 made no change in that regard except in the case of land-aided roads. Their duty to transport the mails arose from the statutes granting them aid.

When therefore we come to consider the meaning of the act of March 3, 1873, we must treat it not as a separate and distinct piece of legislation but in connection with the law then upon the statute book, of which, when enacted, it became only a part. By its enactment some material changes in the existing law were made, and those are to be ascertained from a proper consideration of the entire law. Repeals by implication are never favored. Where there is incon-

sistency between the provisions of the new law and those of the old effect should be given to both if it reasonably may be, and unless there be a positive repugnancy the old law is only repealed by implication pro tanto to the extent of the repugnancy. Wood's case, 16 Pet., 342, 363; Tynen's case, 11 Wall., 88, 93.

Some significance attaches to the fact that the Congress enacted in the revision of 1873 so many of the provisions of the act of 1872 and incorporated therein at the same time the act of 1873, and to the further fact that those provisions have continued as part of the law. The act of July, 1916, 39 Stats., 425, marked a distinct departure from prior law.

As already stated, the revision of 1873 made the Postmaster General "the head of an executive department," thereby enlarging the first section of the act of 1872. It also by section 4003 made an important change in the proviso from which that section is taken in the act of 1873. The latter act provided that "in case any railway company now furnishing railway post-office cars shall refuse to provide such cars such company shall not be entitled to any increase of compensation under any provision of this act," while section 4003 forbids any increase of compensation under the provisions of "the next section," which provides an increase for the use of the cars. These provisions are in the law because of the adoption of the revision of 1873.

The authority and duty of the Postmaster General to make contracts with railway companies, the provision that no contract for carrying the mails "shall be made for a longer term than four years," the right of the Postmaster General to discontinue service on any postal route, the classification of railway routes and the maximum pay therefor, the duty of the Postmaster General to make contracts with others where he can not contract within the maximum rates provided by the statute or "for what he may deem a reasonable and fair compensation," and other provisions of the act of 1872, have been continued as a part of the statutory law along with the act of 1873.

The act of 1845 had directed that the Postmaster General arrange and divide the railroad routes into three classes according to the size of the mails, the speed with which they were to be conveyed, and the importance of the service, while section 210 of the act of 1872 (sec. 3997 Rev. Stats.) provided for arranging the railway routes into three classes according to the size of the mails, the speed at which they are carried, and the "frequency and importance of the service,"

52 so that all railway companies shall receive, as far as practicable, a proportionate and just rate of compensation, according to the service performed. The "equal and just" rate of compensation mentioned in the act of 1845 gives way to just and proportionate rate in the act of 1872.

The act of 1873 appropriates for an increase of compensation, and provides that the Postmaster General readjust the compensation to be paid for the transportation of the mails on railroad routes "upon the conditions and at the rates hereinafter mentioned," said conditions being, first, that the mails shall be carried with due frequency and speed and that a suitable car be provided, and, second, "that the

pay per mile per annum shall not exceed the following rates." (Sec. 4002, Rev. Stats.)

Due frequency and speed and the furnishing of certain cars were conditions, and what should be due frequency and speed, and what the character of the cars, were left largely in the first instance to the determination of the Postmaster General, but being "conditions" it is clearly implied that the matter should be consummated by an agreement of the parties.

Whether in putting in operation the act of 1873 the Postmaster General could have continued to classify the routes into three classes as provided by section 3997 of the Revised Statutes we need not stop to inquire. The authority to do so having been continued, it can not be positively affirmed that the act of 1873 prevents it. It certainly can not be affirmed that the act of 1873 is inconsistent with all of the provisions of section 210 of the act of 1872 (sec. 3997, Rev. Stats.), which, as stated, still stands upon the statute book as declaring the purpose that some distinctions be made "so that each railway company shall receive, as far as practicable, a proportionate and just rate of compensation, according to the service performed." The observance of that purpose necessarily involved the exercise of judgment and discretion by the Postmaster General. Nor is there any doubt that the Postmaster General when he first came to apply the act of 1873 made a distinction between at least two general classes of railroad routes, namely, those carrying mails six and seven days, respectively, having regard to the speed and frequency with which they were carrying the mails as well as to the character of the service performed. The law vested in him full discretion to do that, and the right and duty to exercise that discretion necessarily continued in the office of the Postmaster General. The discretion being vested by statute its exercise by one or more officials could not prevent its exercise by a succeeding one. *Macdaniel's case*, 7 Pet. 1, 14.

Nor did the act of 1873 repeal section 212 of the act of 1872 (sec. 3999, Rev. Stats.), which imposed a duty on the Postmaster General to contract for the transportation of the mails for a compensation within the maximum rates allowed by law or for less than the maximum rates if his judgment dictated that a reasonable and fair compensation would be less than the maximum. The act of 1872 had provided certain maximum rates to be paid "per mile per annum" and the act of 1873 declared that the "pay per mile per annum shall not exceed the following rates."

We are told that some years prior to 1873 the question of classification of the railroad routes with reference to "the size of the mails" and the other provisions of the law had been a matter of difficult application and that the Postmaster General had originated a plan by which he called upon the railroad companies to furnish statements of the weights of the mails being carried, and to that end they were asked to weigh the mails for 30 consecutive working days. This they did in many instances, but at times they failed to do so. They weighed the mails being carried

on 6-day routes for the 30 days during which they were carried, and they weighed the mails on the 7-day routes during a period of 35 days. In both instances they reported as the average the totals divided by 30. These returns were made the basis of adjustments by the Postmaster General where differences arose in the matter of settlements.

The importance of a change whereby the indefinite term "size" of the mails and other features requiring his judgment would be put in more definite form was called by the Postmaster General to the attention of Congress. We are told that the act of 1873 originated in his office and was intended to effectuate the plan he had conceived for making weight rather than size the basis of compensation. If it was intended to give concrete expression to a requirement that the mails should be weighed in the cases of the two classes of roads for 30 and 35 days, respectively, and the dividend in both cases be divided by 30, the language of the act falls short of making it so. It calls for an average and indicated the number of weighings, and hence literally the divisor is the number of weighings and the dividend is their sum. It limited the number of weighings to not less than 30 and left for the determination of the Postmaster General the number of successive working days on which the mails were to be weighed. It required weighings at least once in four years and left it for the Postmaster General to determine whether they should be conducted oftener. The times when they should be made and their frequency were not fixed by the act. If the act was a departure from the classification contemplated in the prior law, it did not prescribe in terms what differences should be made between routes performing different service. It was known to Congress that some routes were carrying the mails for 7 days a week, some for 6 days a week, and others for a less time. The relative proportion of 7-day routes to 6-day routes was about one to seven.

While making frequency and speed conditions upon which contracts would be made, the act did not in terms withdraw the injunction in section 210 of the act of 1872 (3997, Rev. Stats.) that contained the legislative expression of the reason and purpose of classifying the railway routes, and its proper observance rested in the discretion of the Postmaster General.

While section 210 of the act of 1872 provided maximum rates for three classes, the act of 1873 provided a graduated scale of maximum rates based upon average weight. It left, however, the adjustment of rates to intermediate weights in the hands of the Postmaster General.

Many features in the act of 1873 rest for their practical operation in the judgment and discretion of the Postmaster General. Some of these are stated in *Chicago & Alton case*, p. 507, and others are found in other parts of the law.

When the Postmaster General came to apply the law he found that the mails were being transported by different railroads for different numbers of days per week, some for 7 days, others for 6, and yet others for fewer days. The indicated purpose of the law relating to classification was that the different roads

should receive, as far as practicable, a just and proportionate compensation, according to the service performed, and due frequency and speed were conditions entering into the contemplated readjustments. The rates mentioned were limited to designated standards, and the intermediate weights falling between these standards could only be compensated for upon schedules left to the Postmaster General to adjust.

As to those intermediate weights he had discretion, because he could prescribe greater or less rates within the stated standards by making the proportion greater for the smaller intermediate weights than for the larger ones, or he could do the reverse.

The term "weight" had superseded the term "size" in the prior law, but actual weight could not be had without constant weighings, which were impracticable. The average weight carried became therefore the basis upon which the Postmaster General could contract if the railroad companies would agree. An actual average of 30 different weighings would not in the very nature of things show the actual weight transported because it changed (generally increasing) during the year, and the disparity became greater in proportion to the length of the contract term. The weighings were not confined to a given number of days but were to be for not less than a stated number.

The policy of Congress, as indicated by its general legislation on the subject, had been to leave the handling of the business in the Postmaster General's hands under such limitations as they saw fit to prescribe. His duties and his authority (sec. 6, act of 1872) were in a general way defined, among them being that he should "generally superintend the business of the department." In the revision of 1873 the department appears as one of the executive departments, and the Postmaster General is made the head of it. That the affairs of the Post Office Department bear more analogy to a large business enterprise than to a function of Government is apparent. That in the conduct of it much is and must be necessarily left to the judgment and discretion of its superintendent is also apparent. When, therefore, he found that the act of 1873 provided for an average weight of mail, according to which compensation was to be readjusted and under which contracts for their transportation should be made, was the law under which he was to act mandatory or directory merely? By directory provision it is meant that they are to be considered as giving directions which ought to be followed, but not as so limiting the power in respect to which the directions are given that it can not effectually be exercised without observing them. *Hubbert v. Lumber Co.*, 191 U. S., 70, 76, *De Visser case*, 10 Fed. 642, 648.

Whether an act is directory depends upon the sound construction of its nature and object and of public convenience and apparent legislative intention. If it be merely directory, a deviation from it may subject the official to responsibility to the Government, but can not be taken advantage of by third parties. *Bank v. Dandridge*, 12 Wheat., 64, 81.

In Martin's case, 94 U. S., 400, the court held that the eight-hour law of 1868 was a mere direction by the Government to its agent, and did not affect the right of contract. This court has said in effect in an opinion by Judge Barney that the act was merely
55 directory. New York, N. H. & H. case. When the daily average was found by either method it was not controlling upon the roads because they could refuse to contract or transport the mails at all. If the act was mandatory a mathematical average would result and the proposed terms could be adjusted within the maximum rate provided the carriers agreed. If the law was directory or permissive a method to be found by the Postmaster General could be adjusted to actual conditions. If he assumed that the rates were fixed or could be enlarged, he was plainly in error, because the courts have held otherwise. If the act was mandatory it marked a departure from the policy of Congress as regards the conduct of this great business enterprise. It had directed a classification to be made so that "as far as practicable" just and proportionate compensation could be made, according to the service performed.

That the act was directory seems to have been the view adopted by the Postmasters General in the early stages of its application, because the defense of the usage in 1885 was based upon the justice of the practice then in vogue and not upon the absolute requirements of the law. Nor could they plainly read into the language of the act of 1873 a requirement that the mails be weighed 35 days and divided by 30. Speaking as it did of a number of weighings, not less than 30, and using the word "average," a literal application of the terms would call for a dividend made up of the sum of the terms in the divisor, and therefore for an actual average; but treating it as directory would authorize what may be called a permissive average deemed just to the Government and the railroads.

It was materially supplemented in that regard by the act of 1875. By treating it as directory the long-continued usage of the department and the recognition thereof in the repeated appropriations by Congress can be supported. Being directory, it was left to the judgment of the Postmaster General, under such instructions as he considered just to both parties, to ascertain the daily average weight by some other than a mathematical rule. The power was not to be arbitrarily or capriciously exercised, and ample protection against that kind of action could be found in the right of the railroad companies to decline to accept the average as found by refusing to transport the mails or in the course suggested in Jacksonville R. R., 118 U. S., 626, 628. And see Martin's case, 94 U. S., 400. It is clear that if the law permitted him to adopt a course of action which to him seemed just the original adoption of it or the continuance of the usage could not take away or limit the right, duty, or powers of his successors to act independently when in their wise discretion changed conditions seemed to warrant a change in the usage. Charged with the same or similar duties and responsibilities, his successors were vested with the same powers he had. Usage alone would not make it mandatory, and, except that a change in the usage would not be allowed to affect the rights acquired under a previous usage, its alteration can not be

prevented by parties whose claims arise after full notice of the change. *Macdaniel's Case*, 7 Pet., 1; *Alabama Great Southern R. R. Case*, 142 U. S., 615.

When the Postmaster General came to apply the law he called upon the railroad companies, who were then conducting the weighings, to report the weights to him in accordance with the plan he had originated. The practice followed was to weigh the mail on 6-day routes for 30 days and on 7-day routes for 35 days. The Sunday weights on the 7-day routes were reported as part of the Monday weighings. The totals in both cases were divided by 30 and the quotients were accepted as the average daily weight. This daily average weight on the 6-day routes was thus an actual average, and that on the 7-day routes may be called a permissive average. Very generally the maximum rates prescribed by the statute and by the schedule of rates applicable to intermediate rates as formulated by the Postmaster General were applied to the daily average thus ascertained. If the law required an actual average in all cases it is plain that by the method adopted the 7-day routes were credited with more average weight of mail than they carried, and were therefore paid more than an actual average of their weights would have justified within the maximum rates prescribed by law, a course that can be justified only upon the assumption that the average to be ascertained under the law was not an actual average, but such an average as having regard to the other provisions of the law, the Postmaster General might adopt. That Congress was informed of the method adopted, and by repeated appropriations to meet deficiencies and appropriations based upon these estimates, which in turn were based upon said method, may well be taken as admitting that the Postmaster General's action was satisfactory to them. They appear to have been equally satisfied with the results of Order 412. They did not change it.

Within less than two years after the act of 1873 went into effect, the act of March 3, 1875 (18 Stats., 341), was passed. That act, we may assume also originated in the Post Office Department. It provided for a change in the conduct of the weighings and required them to be made by employees of the Department. It carries a provision which we think is of importance in this connection. The prior act had required that the result of the weighings by railroads "be stated and verified in such form and manner as the Postmaster General may direct," while the later act directed that the Postmaster General "have the weights stated and verified to him by said employees *under such instructions as he may consider just to the Post Office Department and the railroad companies.*" [Italics ours.] We do not think that the full force of this expression is found in the suggestion that it merely authorized him to devise some just plan "for obtaining the gross weights," because it is to be assumed that he would have done that anyway. The studied phraseology of the act indicates a broader purpose. It mentions "such instructions as he may, consider just to the Post Office Department and the railroad companies" with reference to having the weights stated and verified to him. The Postmaster General by the plan adopted had credited

the 7-day routes with possibly one-sixth more than the actual average weight being transported. That he supposed he had the authority may be assumed from the fact that he so exercised it. And it is conceivable, at least, that he would desire a more concrete expression of legislative authority to continue the practice. *Chicago & Alton Case*, page 516. The act of 1875 may be accepted as authorizing instructions such as were given, whereby the Sunday weights were reported with the Monday weighings. The authority to give

57 such instruction as he might consider just necessarily involved the exercise of judgment and discretion. We see no reason why in the terms of the act of 1875 may not be found an escape from the literalism of the act of 1873, if it is not found in other provisions of the law, because we find that as late as 1884 the Postmaster General, in submitting the question to the Attorney General and stating the method of ascertaining the average weights, said: "The weight on the Sundays being treated as if carried on Mondays." Such, then, were his instructions, because he considered that course just to the Government and the railroads. But that is not to say that the method pursued was mandatory upon the Postmaster General. The fact that he could give instructions involved the right to determine what the instructions should be, and what would be "just" was for his determination. The determination of it at one time, or by one or more Postmasters General, did not affect the right of others to give other instructions and to find that another course was just. The weighings every four years or oftener required, as they occurred, an observance by the then Postmaster General of the injunctions of the law.

The acts of 1876 and 1878 directed a reduction in the rates, and they were accordingly applied. It was under these acts that the cases arose wherein this court determined that the rates mentioned were maximum rates. They did not affect or establish the divisor.

No further legislation occurred affecting the questions until the act of 1905, which provided that the mails should be weighed for not less than 90 successive working days. Except for the change from 30 to 90 the act of 1905 uses the language of the act of 1873. If literalism be indulged, the language would seem to indicate a change rather than a confirmation of an existing method, but we think the correct view is that Congress still left the discretion of the Postmaster General unimpaired. That law did not make permanent or obligatory any divisor.

The next act was that of March 2, 1907, which changed the rates with reference to roads carrying upward of 5,000 pounds of average weight of mails per day. That act did not affect the method of ascertaining the average. Its requirements are met when, to the average ascertained according to a directory statute, the proper rates were applied, the railroads having still the right to refuse to contract at all.

On June 7, 1907, the Postmaster General issued Order 412, which provides "That when the weight of mails is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day." No

attempt to apply this rule to existing contracts was made. The rule was intended to be and was applied prospectively in the several contract sections as the quadrennial weighings occurred. We do not find that this rule is subject to the objections which the plaintiffs have urged against it.

Turning now to the contentions of the plaintiffs:

(a) That the railroads were by statute declared to be post roads. No significance attaches to that fact in these cases.

The same statutes declare that canals and plank roads shall be post roads. It has been correctly stated that the establishment by law of all railroads as post roads means nothing more than that the mails could and might be carried over such railroads as over the ordinary public highways, and the mere fact of making such declaration did not, even by implication, indicate that the United States could or would undertake, without the consent of the railroad companies and without making compensation therefor, to require any railroad company to transport the mails over its lines. *Atlantic & Pacific Telegraph Co.*, 2 Fed. Cases, 632; *State of Pennsylvania v. Wheeling*, 18 How., 421, 441. Post roads and post routes are not synonymous terms. *Blackham v. Gresham*, 16 Fed. Rep., 609, 611; Congress declares what are post roads, and it requires action by the Postmaster General to authorize railway postal routes.

(b) That what is called the long-continued departmental construction of the act of 1873 is controlling.

It was stated in the *Chicago & Alton* case, page 492, that in the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law and were appointed to carry its provisions into effect is entitled to great respect; and ought not to be overruled without cogent reasons and may be accepted as determining its meaning. By accepting the view above stated, that the law was directory, and not mandatory with reference to the ascertainment of the average weights, we can find support for the departmental usage that was so long continued. If, on the other hand, the act was mandatory and literal it was not pursued correctly. "It will not be contended that one Secretary has not the same power as another to give a construction to an act which relates to the business of the department. And no case could better illustrate the propriety and justice of this rule than the one now under consideration." *Macdaniel's case*, 7 Pet., 1, 14. Such is the rule where the change is made prospective and is not given a retroactive operation. The claims asserted here arose after the Postmaster General had changed the order, and they are in no sense rights vested or accruing under a former construction or usage of the department. The distinction is illustrated by *Macdaniel's case*, where an employee of the Navy Department was held entitled to certain compensation, because he had rendered services under a construction which obtained during the time of the service. He was not claiming under the changed construction, but his rights arose during what may be called the erroneous construction. The distinction is also noted in *Alabama Great Southern Railroad Co. case*,

142 U. S., 615, 620, where the general rule contended for by plaintiffs is stated, and it is said that the courts will look with disfavor upon any sudden change whereby parties "who have contracted with the Government upon the faith of such construction may be prejudiced"; and it stated further: "It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive, and to require from him the payment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the Government." The construction or usage "must be considered binding on past transactions." *Maedaniel's case*, *supra*, page 15.

In *Midwest Oil Co. case*, 236 U. S., 459, the Supreme Court, three justices dissenting, held that the long-continued practice by the Chief Executive of withdrawing public lands sustained the right to do it in the particular case, though there had been no statute authorizing it. Referring to the cases of continued practical construction it was said, page 473: "These decisions do not, of course, mean that private rights could be created by an officer withdrawing for a railroad more than had been authorized by Congress in the land-grant act." "Nor do these decisions mean that the Executive can by his course of action create a power." The court held that a long-continued exercise of the authority was sufficient to sustain action after it had been taken as against parties whose rights arose thereafter, but it was not held that the rule was mandatory and could not be departed from. Nor indeed can it be stated that the rule is so general as to be applicable in all cases involving departmental action because a principle inhering in our system is that it is a government of laws. It would be a strange conclusion to reach that departmental usages founded on its own construction of the statute can not be changed by the same authority which gave them birth. The Congress may enact a law which they can amend or repeal; the courts may construe a statute and modify or overrule their decisions. Is the executive branch alone so hampered that it may not modify or change the construction or the usage or practice or methods it may have adopted when such modification or change is given a prospective and not a retroactive operation and when the claims asserted did not arise until after the usage is changed, and particularly when the usage originated in the exercise of a directory authority?

(c) It is, however, further contended by plaintiffs that their view does not rest solely upon departmental construction, but that it is also sustained by the effect to be given to the passage of the act of 1905 as well as of the acts of 1876 and 1878. Particular stress is laid upon the acts of 1905 and of 1907.

Exception is taken in one of the briefs to the statement in the *Chicago & Alton case* (p. 512) that "it is evident that Congress was not satisfied with the average weights being obtained, whether the dissatisfaction arose from the method or the result, and they therefore changed the law to insure a more satisfactory average." It can not be denied that under the terms of the act of 1873 the Postmaster

General could have weighed the mails for 90 days, more or less, because that act called for weighings for "not less than 30 successive working days." When, therefore, we find a direction in the later act that they shall be weighed hereafter for not less than 90 successive working days, it must be concluded that Congress had a purpose in making the change. If satisfied with the results under the prior law, why enact the later one? If the exception be to the use of the word "method" in that connection it may be conceded that it was not essential to the thought conveyed. It was in effect, if not in words, held that the act of 1905 was not a legislative adoption of the prevailing method for ascertaining the daily average weight and if Congress did not have that method in mind it would seem that the act had no bearing on the question of a fixed divisor one way or the other, since there is nothing in its language to show that they had. Our view of the meaning of the act of 1905 is that it did not affect the powers of the Postmaster General in any regard, whether such powers were statutory or discretionary, mandatory or directory, except to require weighings for not less than 90 successive work-

60 ing days. We might upon that point accept the statement found on different briefs as follows: "This act changed

neither the rates nor the basis of pay, but contains the same provision with reference to said basis as that embodied in the act of 1873;" or

That the act "means the same thing in every particular that the act of 1873 meant, whatever that was"; or

That "it lengthened the period for demonstration by weighing but made no change in the elements to be considered nor in the manner of their use or combination"; or

"This act of 1905 did nothing more than make the weighing period include 90 instead of 30 working days."

If, on the other hand, its purpose was to require "a longer period of weighing by which to get, as was supposed, a fairer average of weights," it certainly authorized the official charged with that duty to adopt a method which would accomplish the desired result. The fact that when the act was upon its passage in the House the chairman of the committee changed the language of the bill as reported so that "there could be no question of the construction that can be made of the law" merely confirms the view that the act was not intended to change the law except as to the number of weighings. In fairness it should be stated that plaintiffs did not by the expressions quoted intend to concede our interpretation of the act of 1873, but they can not find in its terms a positive mandate to pursue the course adopted by the department, and they must have recourse to what is termed the long-continued departmental construction or legislative adoption thereof. Their contention leads to the conclusion that the Postmaster General gave an authoritative and final construction of the statute. This, we think, is beyond his power. The statute does not confer the power of legislation, nor can the exercise of the power have the effect of legislation. *United Verde Copper Co.*, 196 U. S., 207, 215. Every statute, to some extent, requires construction by the public officer whose duties may be defined therein. He must read the law and must, therefore, in a certain sense construe it in

order to form a judgment from its language what duty he is directed to perform. Roberts' case, 176 U. S., 221, 231. There is, however, a distinction between acts involving the exercise of judgment or discretion and those which are purely ministerial. With respect to the former the courts are without power to control executive discretion, but with respect to ministerial duties an act or refusal to act is or may become the subject of review by the courts. *Noble v. Union River Logging Co.*, 147 U. S., 165, 171. We think the course pursued was a matter of usage or practice rather than of construction and finds its support in whatever discretion the act of 1873 vested the Postmaster General with, taken in connection with other provisions of law, supplemented by the act of 1875 authorizing such instruction as the Postmaster General deemed proper. It appears that in "a documentary history of the railway history from its origin, in 1834," which was transmitted to Congress in 1885 by the Postmaster General it was stated that while there had been some little controversy at one time "as to the justness of the present method" of obtaining the daily average weights a little examination would show that "no other way of proceeding could be so just as that now in vogue."

61 Thus it was because he and his predecessors thought that the method was just to the railroads and the Government that he adopted the usage. Proceeding to state that method it is explained in the history that on the 6-day routes the sum of 30 weighings are divided by 30 and "give the daily average," while on the 7-day routes the "weighing is done for 35 successive days (including Sundays) and the aggregate divided by 30 for a basis of pay." Why a succeeding Postmaster General could not with equal right adopt a method of finding an actual average on 7-day routes and dividing the aggregate of 90 days' weighings on 6-day routes for a basis of pay is not made entirely clear, when it be assumed that in his wise discretion he decided that the new method was just to the department and the railroad companies and had a proper regard for the purposes of the law.

In the hearing before a congressional joint committee in 1914, it is shown that in 1873 there were 684 six-day routes and only 97 seven-day routes. The aggregate mileage of the first class was then approximately 48,000 miles and of the latter 15,000 miles. The annual pay to the six-day routes was approximately four and three-quarters millions and to the seven-day routes it was approximately two and a half millions of dollars. Charged with the duty mentioned the Postmaster General found the daily average weights, as has been stated, and his action was followed until 1907. When he came to consider the situation in 1907 he found, instead of 684 six-day routes as in 1873, that they had increased to about 1,394 in number, with an aggregate mileage of about 49,000 miles, while the seven-day routes had increased in number from 97 in 1873 to about 1,600 in 1907, with an aggregate mileage of 153,000 miles. While, therefore, the six-day routes about doubled in number in the 34 years the seven-day routes had increased by about 16 times their number during the same period.

From receiving somewhat more than a third of the whole compensation paid for mail transportation by railroads in 1873 to both classes, the seven-day routes were being paid in 1907 about thirteen times as much as the aggregate of the six-day routes. That is, the six-day routes were being paid approximately three and a quarter millions of dollars per annum in 1907, and the seven-day routes were receiving over forty-one millions of dollars.

Assuming that the weights carried bore some proper relation to the pay received it would thus appear that the seven-day routes (which carried so much smaller aggregate weight in 1873 than six-day routes) were transporting in 1907 many times more weight than the six-day routes were transporting.

The relative positions of the two classes had changed in 1907, as has been shown. The greater mileage and the greater weights appeared on the seven-day routes.

When the Postmaster General laid out his course in 1873, he adopted as a basis for the actual average the six-day routes, they being the more in number and carrying the greater weights. He or some of his immediate successors adopted the same divisor for the seven-day routes "as a basis for pay."

If by the act of 1905 there was to be a longer period of weighing by which to get, as was supposed, a fairer average of weights, and only one divisor was to be used, it can not be reasonably affirmed that a fairer average is not attained when, considering all the routes, the basis is laid upon the class which is greatest in number and handles the larger weights.

We are told in one of the briefs that the readjustments of compensation were made upon the basis of "six round trips per week," and it is hence stated that "Sunday service never was and is not now within the contract and could be discontinued at any time without a reduction of compensation."

If such be the case, does it tend to support the claim that they be credited each day with an increased average? The theory was that as the seven-day routes carried mail more frequently than others, their daily average should not be actual, and it was increased by the method used. If they voluntarily transported the mails on Sunday, they can not recover for the service; and if they do not contract to do so, why may not the Postmaster General, under such instructions as he may consider just to the parties and within the terms of the law, find the actual average and accordingly agree to pay for what the carrier does contract to carry?

We do not mean to imply that the provision as to six round trips per week means what plaintiffs suggest. The postal laws and regulations provide for deductions for failure to perform trips, and it is probable that the failure to transport the mails as agreed is visited with fines and deductions. The act of 1906 requires as much.

But the contention is that the divisor became fixed by the passage of the act of 1905 because, it is urged, "that the enactment by Congress without change of a statute which had previously received long continued executive construction is an adoption by Congress of such construction."

The rule stated is found in the *Hermanos* case, 209 U. S., 337, 339, is rested upon the *Falk* case, 204 U. S., 143, and is repeated in the *Komada* case, 215 U. S., 329, 396. These cases are mentioned in the *Chicago & Alton* case. In referring to the *Hermanos* case it was said that the opinion stated that the contention of the Government that the paragraph under consideration separated distilled wines in bottles into three classes and fixed a specific rate of duty on each and that (1) the court thought the contention was right and needed no comment to make it clear; further, that counsel for the Government "also pointed out" that the tariff act of 1875 and subsequent acts were substantially similar to the paragraph under consideration and that Treasury decisions were in accordance with the interpretation for which the Government contended, and, therefore, it was said, (2) "We have stated that when the meaning of a statute is doubtful great weight should be given to the construction placed upon it by the department charged with its execution," citing *Robertson v. Downey*, and another case, and (3) the rule above quoted is then stated. It was to this third proposition, in its nature distinct from the other two mentioned, that the *Falk* case is cited. Two of the justices concur "solely because of the prior administrative construction," from which we infer that they did not agree that the first contention of the Government was right and needed no comment to make it clear and hence concurred solely upon another ground, the statement relative to which was in the second proposition, above stated. We repeat these observations not because they are essential to the conclusion we reach but as tracing the history of the

63 rule.

The decisions of the Supreme Court are controlling in this court and their statement that a rule had been announced is authoritative. It is not for us to question the accuracy of their statement, but when called upon to apply a stated rule we must consider the facts of the case to which the rule is sought to be applied, and we may refer to the conditions under which the rule was announced, because the rule is applicable where similar conditions present themselves. In the cases mentioned the court was considering tariff legislation; and, as is well known, the proper application of tariff provisions frequently calls for construction of the law under which those charged with its execution may proceed and the rights of importers become fixed. Their construction does not involve a discretion to do one or another thing, but does involve a positive duty to execute the law. Men direct their business and import their goods in reliance upon an adopted construction. Provision is made for hearings in tariff matters, where an interpretation of the act may be had, and the Treasury decisions are reported. It may be that the statement of the rule is not to be limited by the character of the cases in which it was announced, but we do not think it was meant that in all cases where a statute uncertain in terms is reenacted without change the court must ascertain from the department charged with its execution the construction which that department put upon the prior act. The court is not absolutely bound to give, but may give, the departmental construction a controlling effect. *Chicago & Alton*

case, page 492. And where a given rule is invoked we may have regard to the reason for it, because, generally speaking, the reason ceasing, the rule itself need not be applied.

We do not think it necessary, however, in these cases to even attempt to qualify the rule stated. In an applicable case we would not feel authorized to do so. The rule does not apply here, because we are concerned with what is called a construction, but which is, we think, a usage that had its origin in the duty of exercising judgment and discretion and not in interpretation of doubtful terms under which rights would vest, or which, if changed, would defeat or injuriously affect those rights. If when authorized to adopt a course which to him seemed just to the Government and the railroads, the Postmaster General could pursue the one or the other method of ascertaining the contemplated average then manifestly the method adopted by one could be altered by another so long as the change was made prospective, because being charged with all the duties imposed by law the succeeding Postmasters General were vested with all the powers conferred by law.

The claims of the plaintiffs arose after the issuance of order 412, and no retrospective effect was given to that order. The right to give instructions as to the weighing was as absolute in 1907 as in 1873.

With the wisdom of the change, so long as the right to make it remained, the court has nothing to do. Wright's case, 11 Wall., 648.

It may be remarked that the expression in the cases of an unwillingness by the court to depart from a long-continued departmental construction of an uncertain or ambiguous act is referable to the court's action, when called upon to construe the law, and they do not in general refer to the right of a department itself to change.

its construction while giving it a prospective operation.

64 (d) That proceedings had in Congress at or before the passage of the act of 1907 were a legislative adoption of the divisor of 30 or a recognition of it as a requirement of law.

The act of 1907 did not affect the method of ascertaining the daily average weight. It reduces the rates, and it may be observed that while legislation has touched in rare instances since 1873 the question of compensation, it has uniformly been in the direction of reducing it, except in a limited way as the act of 1907 may affect land-grant roads. Only once since 1873 has legislation referred in terms to the ascertaining of average weights, that being the act of 1905. It may be conceded that by the literalism of the act of 1907 the Congress fixed the rates thereafter to be paid on certain routes, and thus for the first time made a rate that was other than a maximum rate. But in doing that no change was made in the right, power, or duty of the Postmaster General to ascertain the average weights under the permissive features of the law.

As bearing upon the effect of the act of 1907 and upon the method of ascertaining the average weights then in vogue, it is earnestly urged that certain proceedings in Congress, as well as the act of 1907 itself, evidence a purpose on the part of Congress to make permanent

the divisor then being used, and that such effect must be given to said act and proceedings.

It is plain that the act does not in terms say what the divisor shall be. The House committee's bill, as reported, provided a method for ascertaining the daily average weight "by the actual weighing of the mails for such number of successive days, not less than one hundred and five." Accompanying the bill was a report explaining the prevailing construction and practice and that the purpose of the said provision was to change the method of ascertaining the daily average weight. This provision in the bill was confessedly subject to a point of order under the rules of the House, and it was accordingly so ruled later. The two amendments offered by a Member were ruled out of order by the Chairman and his ruling was sustained upon appeal. These proceedings were being had in Committee of the Whole House on the state of the Union. The vote that was taken was upon the correctness of the Chairman's ruling, and not upon the merits of the proposed amendments. Placing his ruling upon one of the grounds stated by him that an amendment which will have the effect of changing the discretion vested in an executive officer by law is a change in existing law, the ruling would seem to be correct if we may have recourse to the precedents wherein it is held that an amendment to an appropriation bill having that effect is subject to a point of order. (Hind's Precedents, vol. 4, pp. 569, 570, secs. 3848 et seq.) It may be questioned whether proceedings thus had in Committee of the Whole House on the state of the Union amount to legislation. They can not be accepted as showing the meaning of an act that was adopted containing no reference to the method of ascertaining the average weight. These proceedings were had two years after the act of 1905, where some reference is made to average weights. That the amendments proposed, and for that matter the committee's amendment, would have made definite and mandatory a method of finding the average weight and would have removed any permissive or directory feature in the law or any discretion of the Postmaster General in its application is plain.

65 Assuming that the statutes under which he acted had authorized the Postmaster General in his discretion to adopt one or another method, the use of the divisor 30 was not mandatory upon his successors, and since Congress has not changed the law, that power continues. We can not say that the refusal of the House, if it were so, to make permanent law on the subject was in fact or effect a making of the divisor fixed and absolute. They can not be said to have included an element which they excluded. Since they refused to adopt the proposed amendments which would have removed the discretion and would have made a fixed divisor of 105, we can not say that they removed all discretion and made a divisor of 90 when the legislation omits any reference to either. Nor is the situation altered by reference to other proceedings in the House and Senate.

The courts have consulted legislative proceedings to learn the history of the period, and it is said in the Tap Line cases, 234 U. S., 1, 27, that the debates may be resorted to for the purpose of ascertaining the situation which prompted the legislation.

In *St. Louis & Iron Mountain Railway Co. v. Craft*, 237 U. S., 648, Mr. Justice Van Devanter delivering the opinion, interpreted the law in question according to its terms and then made "a brief reference to the peculiar circumstances in which the new section was adopted," to show that they gave material support to the conclusion to which the court came after considering the terms of the act. After stating the reports of the Judiciary Committees of the two Houses, he adds (p. 661) that while these reports can not be taken as giving to the new section a meaning not fairly within its words, they persuasively show that it should not be narrowly or restrictively interpreted. The act was not silent upon the question involved, and its terms were construed, and this not by what the proceedings showed but by what was "fairly within its words."

Similarly, in *Delaware & Hudson Company case*, 213 U. S., 366, reference is made to certain legislative proceedings, but the court declined to extend the meaning of the statute beyond its legal sense because of a supposed intention not manifested in its terms, and it was said by the Chief Justice that if the mind of Congress was fixed upon a stated proposition, "then we think its failure to provide such a contingency in express language gives rise to the implication that it was not the purpose to include it." This court, in *Atehison, Topeka & Santa Fe R. R. case*, 52 C. Cls., 388, referred to proceedings in Congress for the purpose of ascertaining the subject matter of legislation, to which the mind of Congress was addressed, and to which they gave expression. We can not think that the refusal of one or both Houses to legislate upon a given subject amounts to making mandatory a law which was permissive, or to the withdrawal of a discretion with which an executive officer was charged.

The other cases cited on the briefs are not in conflict with our view.

We hold, therefore, that the Postmaster General had the same authority in 1907 that he had in 1873 and 1875, and thereafter, whether the law contemplated an actual average or a permissive one. Other contentions of plaintiffs are concluded by what has been said.

The case of the land-grant roads depends upon the validity of Order No. 412, and we can not say it was an unlawful exercise of the Postmaster General's discretion under the law. It may be added that

the action is by a plaintiff on parts of whose lines are land-aided sections and that the plaintiff contracted for all classes of its routes.

As to all plaintiffs, being free to contract, the considerations to be stated are controlling. Whether the daily average weight should be ascertained according to the literal terms of the act of 1873 or according to the discretion of the Postmaster General, having regard to the questions left for him to solve, the result is the same because in either case their rights were fixed by their contracts to transport the mail.

Second and chiefly: The actions are upon contract. Under the views expressed herein, and in the *Chicago & Alton* and the *Yazoo & Mississippi Railroad Company cases*, no further discussion of the contention that the statute fixed the compensation is necessary. There was no statutory contract.

It is contended, however, that there was no express contract, and that recovery should be had upon a supposed implied contract, the damages or compensation to be ascertained as upon quantum meruit. While this contention would seem to be a departure from what we think is a proper conclusion from the averments of the petitions, that consideration may be pretermitted.

The general rule is that where one party, at the request of another, does work and labor or performs service for the benefit of such other, the law will imply a promise on the part of the one receiving the benefit to pay the reasonable value of the work and labor done or the service performed where there is no express contract between them fixing the terms upon which the service is to be performed.

"*Indebitatus assumpsit* is founded upon what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay to the plaintiff. Where the case shows that it is the duty of the defendant to pay, the law imputes to him a promise to fulfill that obligation * * *. But the law never implies a promise to pay unless some duty creates such an obligation, and more especially it never implies a promise to do an act contrary to duty or contrary to law." *Curtis v. Fiedler*, 2 Black., 461, 478; *United States v. Russell*, 13 Wall., 623, 630.

By an express promise a party may agree to pay more than the work and labor done or the service performed is reasonably worth, or he may agree upon a measure for ascertaining the value of the work and labor done or service performed.

It was stated in the *Yazoo & Mississippi* case that the record did not show a basis upon which the court could properly adjudge what was the reasonable value of the service performed, and plaintiffs urge that the compensation paid for similar service under prior express contracts should be taken as proof of what the service rendered under the implied contract was reasonably worth—that the former course of dealing, in the absence of more definite proof, is sufficient to establish the essential fact. The contention overlooks, however, an important element in the prior express contracts. That element was the authorized exercise by the Postmaster General of discretion in proposing or agreeing to the compensation, and the court can not supplant his discretion by any of its own, because it has no discretion. What he did in the exercise of his discretion and the performance of his duties when considering his course with ref-

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erence to a given average weight and the terms of a contemplated contract can not be accepted as proof that a service performed after he had exercised his discretion in another way is to be paid for on the basis which he has rejected. The rule could be applied, as has been done, where both parties understood that the service was being performed without any stipulation by both or offer by either of the terms. To apply it in these cases leads to the result that by refusing to accept the Postmaster General's proposal the carriers can carry the mail, receive regular installments of pay therefor, according to the terms of an offer, and by withholding express assent to a vital term in the offer can impose a contract upon the Government which its agent refused to make. It is well

established that a contract can not be imposed upon the carrier. It was not until the act of 1916 that carriers were not free to accept or reject the proposals of the Postmaster General and to refuse to transport the mail.

The carrier's rights being well defined, its duties to accept the proposed terms or to refuse to transport the mail is apparent. By its refusal the Postmaster General would have been obliged, in the performance of his statutory duty, to have made other arrangements or to have offered more satisfactory terms. The law will not raise up a promise which involves the breach or defeat of a statutory duty.

When proceeding in a proper case to ascertain reasonable compensation as upon quantum meruit, the pay is commensurate with the service rendered—"that payment should be made for what was done." *Jacksonville, P. & M. R. R. Co.*, 21 C. Cls., 155, 170; *Railroad v. United States*, 101 U. S., 543, 549. A right to recover as upon quantum meruit implies that the party should have such payment as he reserves for the services performed.

To be entirely accurate in such a matter the carrier would have to be paid for the weights carried. These can not be known, and the only basis for them is the ascertained average.

As to the seven-day routes, there can be no question that upon the fullest application of the rule they can not recover as upon quantum meruit in face of the acknowledged fact that they have received payment for the average weight of mails actually carried. Their claims are illustrated near the beginning of this opinion.

If it be conceded that because of a lawfully vested discretion the Postmaster General was authorized to contract with railroad companies upon the basis as to 7-day routes of a permissive or factitious daily average weight, and at the maximum rates prescribed by law, and further that Congress by their repeated appropriation recognized or approved his action in that regard, as they had the right and power to do, it must yet follow that a court is without right to increase either the daily average weight or the rates prescribed by statute, whether they be maximum or fixed rates.

On the other hand, if their case rested alone upon that question, it might be said that the average on the 6-day routes could not be decreased. Certainly quantum meruit does not mean that they shall be paid for more average weight than they carried, for more service than was performed, and if the 6-day routes are not strictly in that situation, it yet follows that the view next stated is determinative and is applicable alike to both classes of routes.

The mails were transported under express and not under implied contracts.

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Upon the receipt of the distance circular the carrier signed the acceptance, in some instances without qualification, in others with an exception noted therein by its officer, protesting an unwillingness to be bound or refusing to be bound by Order 412. It may be conceded that as to those so objecting there was up to that time no meeting of the minds, and consequently no contract between the parties. Standing alone, "plainly no contract between the parties

resulted from the correspondence so far had between them." It is equally true that if the acceptance clause had been signed without exception a carrier could not have sued the Government as for a breach of contract if the mails had not been subsequently offered, because it was yet open to the Postmaster General to adjust the compensation and propose his terms. He was still charged by the statute with the duty of contracting within the maximum rates or for such compensation as he regarded as just and reasonable. But more occurred. The Postmaster General informed the protesting carriers that they could only carry the mails in accordance with the rules, regulations, and laws, and thereafter when he sent to the several plaintiffs the result of his computation, it stated the terms of his proposal. It was not a four-year contract, but was a readjustment of compensation, "unless otherwise ordered," which had the effect of limiting the duration of the contract. Eastern R. R. case, 129 U. S., 391; Delaware & Lackawanna R. R., 51 C. Cls., 426. It also stated that the carrier was subject to fines and deductions and to the rules and regulations of the department, and Order 412 was one of these.

A carrier which had qualified its acceptance of the distance circular was not bound to accept the proffered terms. A contract could not be imposed upon the carrier (cases *supra*), nor could it compel the letting to itself of a contract for mail transportation. As is stated in one of the briefs, "it was for the Postmaster General, acting upon his own appreciation of the extent of his lawful power to propose terms, and for claimant, not compelled by law to perform such service, to accept or reject the terms proposed as it saw fit." And while this statement was apparently intended to apply to the situation of the parties as they stood when plaintiff had qualified the terms of the acceptance clause, it none the less correctly states the attitude of the parties thereafter until plaintiff had received and transported the mails and had received periodical payments therefor in accordance with the readjustment notice. The carriers accepted these payments without objection of any kind.

In the Eastern Railroad Company case, *supra*, it was said by this court:

"When the extent of an implied contract or the meaning of the language of a written contract are in controversy, the intention of the parties becomes all important. Their acts at the beginning and during the term of the contract acquiesced in on both sides, the claims and construction set up by one party and not denied by the other, go very far to explain, if they do not actually establish by way of estoppel, the actual contract between them as well as its proper interpretation. (*Otis v. United States*, 19 C. Cls., 467.) The present claimant having no clear and definite time contract was bound to take notice of the Postmaster General's offer of future compensation, and its acts at the time amount to an acceptance of his offer."

69 This case was affirmed in 129 U. S., 391; and it is there said (p. 396):

"Chief Justice Richardson, speaking for the Court of Claims, properly said that the order for the reduction under the act of 1878,

and the notice thereof to the company 'constituted an offer on the part of the Postmaster General which the claimant might decline or accept at his pleasure.' Having received the reduced compensation without protest or objection, it may be justly held to have accepted that offer."

In the *Martin* case, *supra*, the Supreme Court stated two principles, both of which are applicable in these cases: The one that the act was merely directory and did not interfere with the freedom of contract, and the other that as the parties were free to contract, effect was to be given to the action and conduct of the plaintiff in having repeatedly accepted, without protest or objection, payments based upon the contract as the Government understood it to be. Other courts have applied the same principles.

In *Coleman's* case, 81 Fed., 824, it is held that even if the construction of the statute therein mentioned is too broad, and the petitioner be entitled to its benefits, he would yet have no right of action in the absence of notice by protest or objection that the payments were not in discharge of the liability.

In *Timmonds' case*, 84 Fed., 933, the Circuit Court of Appeals, Seventh Circuit, took the same view, and, referring to *Martin's* case (p. 934), said:

"It was there ruled that the provision in question is in the nature of a direction by the Government to its agents, and is not a contract between the Government and its servants; that it does not specify what sums shall be paid for the labor of eight hours, nor that the price shall be larger when the hours are more, or smaller when the hours are less;" that being in the nature of a direction, the statute does not constitute a contract to pay for the excess time and that the employee "was under no compulsion, he could have abandoned his service if it proved distasteful or onerous," just as plaintiffs here could have done if there was no express contract.

In *Moses's* case, 126 Fed., 58, the Circuit Court of Appeals, Ninth Circuit, took the same view of the contractual relations between the parties.

In *Averill's* case, 14 C. Cls., 200, 206, it is held that where the employee continued to work, was paid by the day and accepted the payments, he could not maintain his action based upon the theory that eight hours constituted a day's work. *Gordon's* case, 31 C. Cls., 254.

In *McCarthy v. Mayor*, 96 N. Y., 1, the court took the view that the act before them was intended to place the control of the hours of labor within the discretion of the employee rather than of the employer, and yet held that unless there was an express contract providing for extra compensation, it could not be implied.

In *Grisell v. Noel Brothers*, 36 N. E., 452, the Indiana Appellate Court said that the statute permitted parties to contract, and that if one person employs another to perform work for a stated sum, and at the end of the time pays that sum, and the employee accepts it in payment, he can not afterward recover an additional sum albeit he may have worked for longer hours.

70 "The acts and conduct of the parties in the case supposed are such as to raise a conclusive presumption that the amount received by the employee was accepted in full payment of what was due him. The same rule applies where the work is done by the week or month or year."

It appears in that case, as it does in these, that the plaintiff knew when he entered upon the service the nature and amount of work that was required of him, as well as the compensation he was to receive therefor, and it was said that if he was not satisfied at the end of a day or week with what was being paid him, he should have exacted an agreement for more compensation or exercised his right to quit the employment.

"By continuing in the employer's service under the terms of the employment, he waived any right to claim additional compensation."

The principle is illustrated by *Vogt v. City of Milwaukee*, 74 N. W., 789, where an employee worked 8 hours daily for the first 30 days, and thereafter, without protest, worked 12 hours a day and received the same pay. A city ordinance had provided that 8 hours should constitute a full day's work for city employees. The plaintiffs sued for compensation for overtime and contended that the ordinance entered into and became a part of the contract, and that thereby the city became bound to pay the amount specified for each day of 8 hours' service. A similar contention is made in these cases. The Supreme Court of Wisconsin held otherwise, and said (p. 791):

"The law which allows contracting parties, through the medium of an express contract, to fix in advance the value of a service to be rendered, also allows them to fix the value in cases of implied contract after the service has been rendered. It may as well be fixed by acts of the parties as by express agreement. Here it seems certainly to have been fixed by acts of the parties, and the plaintiff can not now be permitted to dodge or escape the legal effect of his conduct."

It is unnecessary to multiply cases (though some are cited below) to establish the rule that the existence of contractual relations or the acceptance of a proposal can as well be shown by the action and conduct of parties as by their language. What a party does can as well conclude him as what he says he will do. Each time a plaintiff was paid, and received the compensation stated, it "as effectively notified him that his compensation for the time in service was the rate so specified as if he were formally notified." *Vogt v. Milwaukee*, supra, citing *Miller case*, 14 C. Cls., 200.

It was held in *Baird's case*, 96 U. S., 430, where the plaintiff had presented an unliquidated claim to an accounting officer, claiming over \$150,000, which they reduced to about \$97,000, and then sent him a voucher for the latter amount, which he received without protest or objection, that he was concluded by his action in accepting the payment.

The rule was applied in *Garlinger's case*, 169 U. S., 316, 322, and was recognized in *McMath's case*, 51 C. Cls., 356.

Cases supra; *Central Pacific Co.*, 164 U. S., 93, 97; *Illinois Central R. R. Co.*, 18 C. Cls., 118, 132, 136; *Jacksonville, Pensacola & Mobile Co.*, 21 C. Cls., 155, 170, 171; 118 U. S., 626; *Minn. & St. Louis*

- 71 Ry. Co., 24 C. Cls., 350, 360; Alabama Great Southern R. R. Co., 25 C. Cls., 30, *ibid.* 142 U. S., 615; Texas & Pacific Ry. Co., 28 C. Cls., 379, 390; other cases; Chicago & Alton Case, p. 521, 532.

If any effect is ever to be given to a party's action as determining the existence of a contract, these cases call for its application.

It is admitted that the carriers received and transported the mail after the alleged exception to Order 412; admitted that they received compensation in accordance with the readjustment notice; admitted that this compensation was paid monthly or periodically; admitted that the readjustment of compensation was made for no definite period, but "unless otherwise ordered"; admitted that the readjustment of compensation was subject to fines and deductions; admitted in at least one of the cases at bar, and it may be assumed as to others, that fines and deductions were imposed and retained without objection; admitted or shown that the notice stated that the compensation was based upon not less than six round trips per week; admitted or shown that no objection to the payments was at any time made, and that several years intervened before suit, and these things being true, the action and conduct of the plaintiffs were plainly inconsistent with their present contention.

The distance circular proposed no terms and the readjustment notice did. It was the acceptance and transportation of the mail and the repeated acceptance of the monthly or periodical pay after the Postmaster General had replied to the protests, all without protest or objection, that consummated the contract, the terms of which were evidenced by the notice itself. While the carrier had protested it would not consent, it yet consented. A party will not be heard to deny the natural and reasonable effect of his action as regards his contractual relation or to take a position inconsistent therewith when to do so would involve a breach of official duty by the other contracting agent. The law required the Postmaster General to make contracts for mail transportation, to file copies of them (Rev. Stats., sec. 404), and to enforce fines and deductions under the terms of his contracts with railroad companies (act of June, 1906). It did not lie with the carrier to defeat these requirements by a refusal to accede to one term of the proposal and then pursue a course of action antagonistic to the suggested refusal. It can not compel the leaving of the contractual relation to be implied. It could have refused the terms or it could have accepted. It could not select those that served its purposes and leave to the incertitude of the future the ascertainment of the terms upon which the mail was being transported. In a matter of so great public importance, it was its duty to be definite and to speak if it did not intend to be bound. Their action establishes the essential fact. The plaintiffs transported the mails in accordance with the terms proposed by the Postmaster General, and, having been paid the sums respectively due them, it follows that their petitions should be dismissed. And it is so ordered.

BOOTH, *Judge*, concurring:

I concur in the opinion of the court and might well rest the matter with this statement. Having, however, positive conviction as to the case itself it may not be amiss to briefly discuss some features of the litigation which lead to the foregoing opinion.

The relationship between the carriers and the United States was contractual. The Postmaster General was free under the
72 statute to negotiate and consummate such contracts for the carriage of the mails as he deemed just to both the contractor and the Government, subject only to the express limitations enumerated in the act of 1873. The limitations in the act of 1873, in so far as the present case is concerned, circumscribed alone the maximum compensation to be paid the contractor and prescribed a minimum period of weighing to ascertain the "average weight per mile per annum" upon which the compensation was to accrue. There is nothing aside from these provisions in the statute which irrevocably bound the Postmaster General to contract with the carriers on the basis of the mathematical process adopted by him after the statutory weighing period had been observed; he might pay the maximum compensation; he might pay less; and surely was invested with the official discretion indispensable to the making of an agreement fair to both parties. Within the zone prescribed by the terms of the act of 1873 there was an unfettered field wherein the right of contract was unabridged. The claimant company and the Government within these limits stood upon an equality and the bargain consummated was subject in every way to the ordinary rules governing ordinary contracts. The claimant company accepted the mails and performed its part of the contract in the face of an express provision, directly made a part of the contract, in response to claimant's protest, and finally accepted the compensation fixed in the contract without further protest or objection. *Yazoo & Miss. Valley R. R. v. United States*, 50 C. Cls., 15.

A careful review of all the legislation pertaining to the administration of the Post Office Department, and particularly with respect to the transportation of the mails, discloses a legislative intent to refrain from denying a wide discretion to the Postmaster General in the matter of administrative detail. If Congress designed a fixed and determinate compensation to be paid upon the average mileage basis per annum there would have been no necessity to do more than provide the means of ascertaining the same and thereby limit the contracting authority of the Postmaster General. The various statutes upon this subject, as most pertinently observed by the Solicitor General, were clearly intended to fix a maximum compensation, fair in any event to the railroad company and of sufficient elasticity to protect the Government. The field of fair negotiation, except as expressly provided, was left open, and the railroad company was under no compulsion to accept the terms of a contract it believed to be onerous and unremunerative. (See cases cited in opinion of Chief Justice.) Having engaged to perform a service under the terms of a

contract authorized by law and having performed said service and accepted the full compensation agreed upon by the parties, it is difficult to perceive upon what authority a suit for increased compensation can be predicated in view of the authorities cited in the Chicago & Alton case, 49 C. Cls., 520, 521.

The act of 1873 expressly precludes the possibility of preciseness in ascertaining compensation to be paid the railroad companies for the transportation of Government mails. "The pay per mile per annum shall not exceed * * *. On routes carrying their whole length an average weight of mails per day * * * the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working days, not less than thirty * * *". This language formulates a method inherently

73 discretionary. The very terms used erect a flexible basis to meet changing conditions and varied circumstances. Thirty days was considered by Congress as the minimum of fairness in the ascertainment of an annual average. Can it be said that a long-continued departmental opinion that the period stated continues to bring to the railways a fair compensation ripens into an unchangeable law, absolutely concluding the department from meeting changed conditions and circumstances? Judge Barney has discussed this phase of the case, and with his discussion I unreservedly agree. I think the statute abounds with express and unambiguous terms which unmistakably repose a wide discretion in the Postmaster General a clear legislative intentment to do no more than prescribe such limitations as Congress deemed wise, leaving the Postmaster General free to act in all other respects.

BARNEY, *Judge*, concurring:

It has been said that wise men often change their opinions, and I wish to exemplify the fact that unwise men sometimes do the same thing. My views of the act of 1873 will be found expressed in the case of N. Y., N. H. & H. R. R. Co., decided February 25, 1918, 53 C. Cls., —.

I do not think it can be judicially said that by the terms of section 4002 R. S. any divisor was absolutely provided for. The Postmaster General was thereby directed to pay the railroads in proportion to the average weight of the mails carried, this average to be determined by weighing the same at least once every 4 years for not less than 90 working days. Of course this would imply some mathematical process which would involve some kind of a divisor. In any event the compensation paid should not exceed a definite sum named. This weighing, whether by the railroads as at first provided or under the supervision of the Postmaster General himself, was for his benefit alone and for the purpose of enabling him to exercise wise discretion in making contracts for the carriage of the mails. The details to be followed in the weighing in order to approximately obtain the average was entirely at the discretion and under the direction of the Postmaster General. It was for his information it was to be obtained, and it was for him alone to say how this was to be done. I can see

why this long continued exercise of this discretion in a certain way should not be changed as to existing contracts because contracts are construed according to the intention of the parties to them when they were executed, and in this case these existing contracts were understood by both parties to have been executed in the light of the then existing method of obtaining average weights. But I do not see how a discretionary authority can ever be said to ripen into law by continued usage. Presumably the Postmaster General for a succession of years obtained such average weight in a way he thought best adapted to do justice to the different classes of railroads carrying the mails. This discretion seemed to be implied in the law.

Circumstances mentioned and described in the opinion of the Chief Justice became materially changed, and what was perhaps at one time a proper exercise of this discretion became improper, and a later Postmaster General in the exercise of the same power of discretion obtained this average weight in another way. In both instances it was a proper exercise of discretion which was once changed in
74 effect, and can be changed again if reasonably within the statute so as to affect the future contracts for the carriage of the mails.

DOWNEY, Judge, concurring:

I concur fully in all that has been said by the Chief Justice in the opinion of the court. Perhaps a word more might be added with reference to the theory presented in those cases in which the railroad companies injected into their proposals to carry the mails "upon the conditions prescribed by law and the regulations of the department" an exception with reference to Order 412, that the subsequent delivery of mails to such railroad for transportation by the United States gave rise to a contract in which Order 412 was not embodied. The contention might have force if the transaction rested there. But it did not. The Postmaster General specifically declined to permit any exception as to Order 412 and insisted that the contract should be subject to all the regulations of the department, as in its terms it was, and if effect is to be given to subsequent action of either of the parties, as it undoubtedly must be, it is to be found in the voluntary acceptance by the railroad companies of the mails for transportation under these circumstances, after the specific refusal of the Postmaster General to modify terms, and which action can not be interpreted otherwise than as an acceptance of a contract which was subject to and in which were embodied all the regulations of the department applicable thereto. The service was performed under such a contract, compensation was paid and accepted thereunder, and it seems idle now, because of an antecedent protest or an attempted but rejected modification of terms, to contend that the contract is something else than as entered into or is in some respect not binding upon one party thereto. It is difficult to see any basis upon which, after having entered into a contract not tainted with fraud or duress, performed service thereunder and received compensation therefore in accordance with its terms, the court can now

be asked to write and enforce a different contract. The equities of rule 412 are capable of demonstration, the inherent and unexhausted discretion of the Postmaster General is as evident as it was necessary, but in my judgment, while other and related matters are proper subjects of discussion, we have to do, in the last analysis, with a contract relation and must leave the parties where, by their contract, they have placed themselves.

HAY, *Judge*, concurring:

It would seem, and indeed is, a work of supererogation to add anything to the very able and exhaustive opinion of the Chief Justice in this case. In his opinion he has discussed clearly and with singular ability every phase of it. Although I am convinced of the soundness of the views therein expressed, I have deemed it not unwise to very briefly express my views on one branch of the case.

The plaintiffs, in these cases, seem to insist that while the Postmaster General was given discretion, under the law, to determine the manner in which their compensation for carrying the mails may be determined, yet that he, having once exercised that discretion, could not change the method so adopted. The above is a bald statement of their contention. The mere statement of it is its refutation.

75 It would be monstrous to say that an executive officer, clothed with discretion to do certain things, in exercising the discretion given him, is bound to continue to act in the method first adopted by him, no matter whether that method was equitable or inequitable, proper or improper, just or unjust to the parties affected.

The fact that it was a long-continued usage does not change the principle. If in the course of time, it is discovered that the usage adopted is unjust to one of the parties, surely it will not be denied that the executive officer, exercising the discretion conferred upon him by law, can change the method; certainly this must be so when the change is not made to affect any person with whom a contract is being carried out, but applies only to contracts to be made in the future.

The opinion of the Chief Justice fully discusses and covers all the points of the case and I heartily concur in his conclusions.

76

VII. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Eleventh day of March, A. D. 1918, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge, and decree that the New York Central and Hudson River Railroad Company, as aforesaid, is not entitled to recover and shall not recover any sum in this action of and from the defendants, the United States; and that the petition be and it hereby is dismissed.

· BY THE COURT.

VIII. *Claimant's Application for, and Allowance of, an Appeal to the Supreme Court.*

Now comes The New York Central and Hudson River Railroad Company, claimant in the above entitled action and prays the allowance of an appeal to the Supreme Court of the United States from the judgment of this court rendered in said cause on the 11th day of March, A. D. 1918.

McKENNEY & FLANNERY,
Attorneys for Claimant.

Filed June 5, 1918.

Ordered: That the above appeal be allowed as prayed for.
By THE COURT.

June 10, 1918.

77

Court of Claims.

No. 32812.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY

VS.

THE UNITED STATES.

I, Saml. A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact and conclusion of law filed by the court; of the opinion of the court by Campbell, Ch. J., and of the concurring opinions by Booth, J., Barney, J., Downey, J., and Hay, J.; of the judgment of the court; of the claimant's application for, and allowance of, an appeal to the Supreme Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 10th day of June, A. D. 1918.

[Seal Court of Claims.]

SAML. A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 26586. Court of Claims. Term No. 500. The New York Central & Hudson River Railroad Company, appellant, vs. The United States. Filed June 12th, 1918. File No. 26586.

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DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

WATER RESOURCES DIVISION
NATIONAL CENTER FOR WATER RESEARCH
WASHINGTON, D. C. 20250

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 133.

THE NEW YORK CENTRAL & HUDSON
RIVER RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

SHORT STATEMENT OF CASE

and

**OUTLINE OF POINTS RELIED UPON FOR
REVERSAL.**

Appellant, The New York Central and Hudson River Railroad Company, sues to recover the sum of \$1,257,630.36, being a balance claimed to be due it under applicable laws of the United States for

transporting United States mails over certain specified railway postal routes, between July 1, 1909, and June 30, 1913, both inclusive.

The Court of Claims upon the facts found by it (R., 15-34) held that appellant was not entitled to recover and directed the petition herein to be dismissed (R., 34).

The case is typical of the class of cases commonly referred to as Mail Pay Divisor Order Cases, and apart from mere inconsequential details, such as dates and the amounts claimed, differs from the case of *The Northern Pacific Railway Company vs. The United States* (No. 109, O. T., 1919), heard herewith, chiefly if not solely in the fact that the Northern Pacific Railway Company is a railway company "to which the United States have furnished aid by grants of lands, right of way, or otherwise," and consequently is subject to the act of June 8, 1872 (17 Stats., 309), and subsequent acts specifically pertaining to the carriage of mails over so-called "Land Grant Roads," while such acts have no pertinency in the instant case.

Appellant contends that in the absence of an express contract between it and the United States, acting through and by the Postmaster General providing otherwise, it should have been paid and is

now entitled to recover from the United States, for mail transportation service which it faithfully rendered during the period in question, compensation at annual rates per mile of road operated, varying only with the varying average daily weights of mails carried per annum the entire length of each route, such average daily weights to be ascertained in the case of each route precisely as required by the mandatory provisions of the acts of March 3, 1873 (17 Stats., 558), as modified by the acts of July 12, 1876 (19 Stats., 79), June 17, 1878 (20 Stats., 142) and March 3, 1905 (33 Stats., 1082, 1088).

While not specifically required by statutory provisions to "carry the mails at such prices as Congress may by law provide," as are the so-called "Land Grant Roads," nevertheless, having for many years carried the mails under the law and at the rates prescribed by Congress between the greatest mercantile and most densely populated centers of the United States, out of deference to the compulsory character of the public service which it, in conjunction with other mail-carrying railroad companies, had served to create, and the ever-present and goading demands and necessities of commercial and social intercourse, which it alone in great part was capable of even reasonably satisfying, this appellant, during the period in question, was without practical choice and was as truly bound by

its duty and obligation to the communities which it served to carry without cessation, notwithstanding differences between the Postmaster General and itself, as were the "Land Grant Roads," leaving questions respecting amounts of compensation payable to them under the law for the service rendered to be determined in orderly course by appropriate courts of law.

In this view no estoppel in law or equity reasonably ought to be predicated upon the acceptance, from time to time, of such sums by way of compensation as the Postmaster General, against appellant's clearly expressed and never withdrawn protest, erroneously and improperly tendered to it, particularly as both the Postmaster General and the Congress of the United States were fully informed long prior to July 1, 1909, the beginning of the period of service now in question, of the protest on part of the mail-carrying railroads of the United States to the use by the Department of the rule prescribed by the so-called Divisor Order No. 412 for ascertaining the daily average weight of mails carried the whole length of their respective roads, of the fact that this appellant declined to contract to carry if the applicability of Order 412 was to be insisted on, and of the further fact that certain of the railroad companies who had protested had also filed suits calling into question the

validity of such order. (See Finding of Fact XV, R., 34.)

Appellant also contends that in the absence of an express contract voluntarily entered into between the Postmaster General and itself, the service which it rendered between July 1, 1909, and June 30, 1913, both included, in transporting the mails under the circumstances conditions and between points specified in the Findings of Fact, gave rise to an implied contract on the part of the United States to pay for such service at the rates specified by the statutes which both authorized the service and prescribed rates of compensation to be paid therefor.

Also that the Postmaster General was without lawful authority to promulgate Divisor Order 412, as same contravenes the express mandatory terms of the statutes of the United States which prescribed both the duty and the power of the Postmaster General in the premises. Being without lawful power to prescribe any such rule as Divisor Order 412 furnishes for ascertaining the average weight of mails per day carried throughout the whole length of the respective routes here involved, Divisor Order 412 neither constitutes a condition of the railway mail service "prescribed by law" nor a regulation "of the Department applicable to railroad mail service."

Both the Post-Office Department and appellant having declined to enter into an express contract for this service, which the former desired and the latter alone was able satisfactorily to perform,—the single point of difference between them being the proposal by the former to inoculate the tendered form of contract with the virus of Divisor Order 412, and the refusal by appellant to accede to such unlawful operation, the Department, though precisely informed (Finding XII, R., 29) that—

“This company cannot accept as full compensation for services rendered the amount fixed according to the method of computation of average weight prescribed by said order (No. 412), and reserves the right to insist on payment according to the method of computing the average weight applied by the Department prior to the issuance of Order No. 165, issued by the Postmaster General, March 2, 1907;”

nevertheless, and without more, beginning July 1, 1909, and continuing through the period in question, tendered to appellant at long-established receiving points and in the long-accustomed and usual manner mails to be transported to designated destinations over the respective routes involved, and appellant, safeguarded in its rights by the above, safely transported and delivered the same.

The service thus requested and rendered in the absence of an express agreement as to compensation to be paid therefor, entitled appellant to receive and obligated the United States to pay its reasonable worth, of which the statutes of the United States furnish the measure.

The elements of length of route and the daily average weight of mails per annum carried being known, the statutes of March 3, 1873; July 12, 1876; June 17, 1878, above referred to, together with applicable valid regulations of the Post Office Department, supply the only other elements necessary to be considered, and a simple arithmetical calculation furnishes the answer to the problem. Under the circumstances appellant is not now to be estopped by its acceptance of the lesser sums tendered by the Department on the basis of its wrongful ascertainment of average daily weights carried from maintaining suit to enforce its demand for the balances claimed to be due, the Postmaster General, from the beginning to the end of the period during which the service was rendered, having been fully informed as to the contentions of appellant based upon above statutes and as to the amount of compensation rightfully payable to it.

Acceptance of a smaller amount, even though expressed to be in full satisfaction of a larger amount claimed (which was not the case here),

where the amount claimed is a liquidated sum, or, where, as here, is readily to be liquidated by a simple arithmetical computation, will not constitute payment in full nor operate as a bar to either a claim or suit brought for the balance. *Fire Ins. Assn. vs. Wickham*, 141 U. S., 564, 577; *Chicago, Mil. & St. P. Ry. Co. vs. Clark*, 178 U. S., 353, 366, 372.)

ASSIGNMENTS OF ERROR.

I.

Upon the facts found by the Court of Claims its judgment should have been for appellant in the sum of \$1,257,603.36.

II.

Error in concluding as matter of law that the promulgation of Divisor Order 412 and its application to the instant case was within the lawful discretionary powers conferred upon the Postmaster General by the act of March 3, 1873 (17 Stats., 558).

III.

Error in concluding as matter of law that the method prescribed by Divisor Order 412 for ascertaining the average weight of mails per day carried the whole length of each route concerned, was

a lawful method for such purpose, notwithstanding the express provision of the act of March 3, 1873 (17 Stats., 558), that "the average weight (of mails per day carried the whole length of the particular route) to be (shall be) ascertained in every case by the actual weighing of the mails for such a number of *successive working days*, not less than thirty (by act of March 3, 1905, 33 Stats., 1088, "not less than ninety") * * * as the Postmaster General may direct.

ARGUMENT.

General Considerations and Historical Summary of Applicable Statutes and Contemporaneous Practice of Post Office Department Thereunder.

These cases are similar to the cases of Chicago & Alton R. R. Co., appellant, *vs.* United States and Yazoo & Mississippi Valley R. R. Co., appellant, *vs.* United States, numbered respectively 30 and 58 of October Term, 1916, wherein the judgments of the Court of Claims dismissing the petitions (see 49 Court of Claims Reports, 463, and 50 *ibid.*, 15) were, on January 15, 1917, by this Court, affirmed by an equally divided court (242 U. S., 533).

The issues involved in this case are not foreclosed by any prior decision of this or any other

tribunal of controlling influence. The doctrine of *stare decisis* has no application here.

The learned opinions and judgments of the Court of Claims above referred to, which set aside that court's own previous opinions and judgments in favor of the carriers named, did not crystallize into controlling authority, though affirmed here by an equally divided court.

As said in *Hertz, Collector, &c., vs. Woodman*, 218 U. S., 205, 213, Lurton, A. J., speaking for the court:

"Under the precedents of this Court, and, as seems justified by reason as well as by authority, an affirmance by an equally divided court is, as between the parties, a conclusive determination and adjudication of the matter adjudged; but the principles of law involved not having been agreed upon by a majority of the Court sitting, prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts."

Apart from the rule thus authoritatively declared, the cases referred to cannot incite to action the rule of *stare decisis*, because of substantial differences with the case at bar. In the cited cases the actions were based upon what were asserted to be completed contracts in writing. The instant case proceeds upon an implied or constructive contract founded upon a statutory duty and obligation

to pay the reasonable worth of the service performed by plaintiff at defendant's request. Viewed from the standpoint of things adjudged, the issues here involved are *res integra*.

Appellant conceives that the correspondence between Second Assistant Postmaster General and itself, set forth in the findings of facts in this case, demonstrates that there was no express contract in writing between the United States or the Postmaster General or Second Assistant Postmaster General and itself covering or limiting compensation to be paid to it for transporting the mails during the period of July 1, 1909, to July 1, 1913, or any portion thereof, particularly such a contract as is sometimes styled "a correspondence contract."

For many years prior to July 1, 1909, appellant had been continuously engaged in the transportation of mails over the numerous mail routes specified in the findings of fact pertaining to this case, and had been receiving during all of such years, at understood intervals, from the United States compensation for such service, which compensation had, throughout the entire period of carriage, been ascertained and determined by the Post-Office officials and itself in hearty accord upon bases which both conceived, and as evidenced by the long-continued course of action had in effect agreed, were

established by law declared and exposed in the provisions of the acts of June 8, 1872, ch. 335, 17 Stats., 309, R. S. U. S., 3997; March 3, 1873, 17 Stats., 558, R. S. U. S., 4002; March 3, 1875, 18 Stats., 341, July 12, 1876, 19 Stats., 79; July 17, 1878, 20 Stats., 142; March 3, 1905, 33 Stats., 1082, 1088, and the act of March 2, 1907, 34 Stats., 1205, 1212.

By the act of June 8, 1872, 17 Stats., 308, sec. 201, all railroads or parts of railroads then or thereafter operated were declared to be "post roads" (R. S. U. S., 3964), and by act of March 1, 1884, ch. 9, 23 Stats., 3, "all public roads and highways, while kept up and maintained as such," were declared to be "post routes."

The establishment by law of all railroads as "post roads" meant nothing more than that the mails could and might be transported over such railroads as over the ordinary public highways, and the mere fact of making such declaration did not, even by implication, indicate that the United States could or would undertake without the consent of the railroad companies, and without making compensation therefor, to require any railroad company to transport the mails over its lines.

Atlantic, etc., Tel. Co. vs. Chicago, etc., R. Co., 6 Bissel, 158; 2 Federal Cases No. 632.

“Post roads” and “post routes” are not synonymous terms. The term “post route” indicates the appointed course or prescribed line of mail transportation, while “post roads” indicates the highways or public passages, as, for instance, railroads, employed in connection with or for the purposes of such transportation.

Blackham *vs.* Gresham, 16 Federal Reporter, 611.

U. S. *vs.* Kochersperger, 26 Federal Cases No. 15,541.

The right of the United States in the property established as a “post road” is the mere right, on making adequate compensation, of transit over such “post road” for purposes incidental and necessary to the carrying of the mails, and in the case of obstructing this right to provide by its own laws an adequate remedy or suitable punishment.

Cleveland, etc., Co. *vs.* Franklin Canal Co., 36 Federal Cases No. 2890.

The act of June 8, 1872, *supra* (sec. 215: R. S., 3965), required the Postmaster General to “provide for carrying the mail on all post roads established by law,” and also (sec. 210: R. S. 3997) required the Postmaster General to arrange “the railway routes on which the mail is carried” into three classes, according to the “size” of the mails,

the speed at which they are carried and the frequency and importance of the service and restricted (R. S. U. S., 3998) the amount of compensation which should be paid "per mile per annum" to the carriers operating such routes in respect to each of the classes of "railway routes" provided for. This was in effect but a reenactment of the act of March 3, 1845 (5 Stat., 738), discussed below.

In order to ascertain as approximately as might be "the size of the mails" carried over any particular "post route," the Post-Office Department, subsequent to 1845 and prior to March 3, 1873, had adopted the practice of weighing such mails at intervals during weighing periods of thirty-five days each, the total aggregate of all mails carried over any particular route during such weighing period of thirty-five days being divided by the figure thirty as a quotient for the purpose of ascertaining the average daily "size" of the mails so carried. (Finding III, R. 18-20.)

This practice was influenced, no doubt, if not solely dictated, by the fact that at its origin and for many years thereafter, in most instances extending to this date, the greater number of the post-offices in the United States did not operate on Sundays and consequently were not prepared to deliver to or receive from the railroads mails on such days. It is also true that in the earlier days,

if it be not likewise true at present, a considerable number of the railroad companies carrying the mails did not operate trains for such or any other purpose on the Sabbath days, but confined their operations to the secular days of the week, then and ever since until now, in general speech, known as "working days." The weighing period, namely, thirty-five days, then adopted and (until 1905, when changed to ninety) since consistently followed in ascertaining the average daily weights of the mails, carried embraced thirty (or ninety) secular week or working days and five (or fifteen) non-secular, non-working or Sabbath days.

In order "to insure, as far as may be practicable, an equal and just rate of compensation, according to the service performed, among the several railroad companies in the United States, for the transportation of the mail," and in order to fulfill the duty imposed upon him "to arrange and divide the railroad routes * * * into three classes according to the *size* of the mails," etc., etc. (Act of March 3, 1845, 5 Stats., 732, 738, Ch. 43., sec. 19), "so that each railway company shall receive, as far as practicable, a proportionate and just rate of compensation, according to the service performed" (Act "to Revise, Consolidate and Amend the Statutes Relating to the Post-Office Department," approved June 8, 1872, 17 Stats., 283, 309, sec. 210), it was and still is essential that each railroad com-

pany should be paid, "as far as practicable," for every pound of mail matter which it may carry over its several routes, and as the attainment of perfection in such regard was and is impossible except at great expense and day by day through all the year weighings, the custom known to and sanctioned by the Post-Office Department in including in the total all weights of mails carried on each day whether secular or non-secular, working or non-working, week days and Sundays, and dividing the totals thus arrived at, whether for roads carrying every day in the week, including Sundays, or for those carrying week days only, by the divisor thirty (30) representing the "working days" common to both classes to reach a "statutory," not a mathematical or exact, but an "as far as practicable" average weight of mails per day "carried the whole length of the route," became notoriously established. While previous to 1867 "no measures were ever taken to procure from any considerable proportion of the roads in the service of the department statements of the amounts of mail matter conveyed by them, respectively," in February and March of that year a "railroad weight circular" was issued to all railroads carrying the mails requesting them to weigh for "thirty consecutive working days" and report the results to the Department. The majority of the roads complied with the request, and computations of the average daily weights carried

were made upon these returns (Report, Postmaster General, 1867, pp. 10, 11, 71-91, inclusive).

The practice established and until the promulgation of Order 412 consistently followed by the Department in determining the average daily weight of mails carried by the various railroads over the individual routes, is fully and carefully explained in a letter from the Second Assistant Postmaster General, to whose care such matters are specifically committed by section 18 of the Postal Laws and Regulations, to the Postmaster General, under date of January 9, 1907, in reply to an inquiry from the Chairman of the House Committee on Post Offices and Post Roads requesting to be advised "of the general practice followed by the Post-Office Department in determining the weight of the mails at the various weighing periods under the law, and the method of computations by which the rate for such payment is ascertained."

This letter was read during the course of debate on the bill which became law on March 2, 1907 (34 Stats., 1212) and is spread at large in the Congressional Record of Proceedings in the — Session of the — Congress, vol. 41, part 3, p. 3350.

First stating that for the purpose of weighing the mails the United States had been divided into four sections, in one of which the mail is weighed each year; that when the weights are about to be taken

the Department carefully selects and places weighers in the mail cars and stations who, under supervision, weigh all mails on and off at each station from each train run throughout the weighing period, the aggregate being the total weight on and off all the trains at each station during the period; that calculations based upon such aggregates in connection with the so-called Distance Circular showing distances between the several stations of each route develop the average weight carried over the entire route; said letter proceeds as follows:

“* * * to determine the average weight of mails per day carried over the entire route the average weight carried over the entire route for the entire weighing period is divided by the number of “working days” (to use the language of the statute)—that is, the number of week days, excluding Sundays, during the weighing period.

“The question as to whether the average daily weight contemplated by the statute is correctly ascertained by the present practice of dividing the total average weight carried over the entire route by the number of week days, excluding Sundays, within the weighing period, or whether the average daily weight would be more correctly determined by dividing the total average weight carried over the entire route by the total number of days, including Sundays, during the weighing period, has frequently been discussed and was recently referred to on the floor of the House. It has been contended by some

that the average should in every case be obtained by using as a divisor the actual number of days in the weighing period. It can not be denied that this would produce an average daily weight for that period, but the question is whether this would produce the average intended by the statute, and in order to ascertain this not only the special language of the statute providing for an annual rate of pay based upon an average daily weight, to be ascertained by an actual weighing of the mails for a certain number of "successive working days," should be considered, but also the history of the manner of adjusting compensation for railroad service which preceded the act of 1873, the extent to which it was incorporated in the act of 1873, and the contemporaneous statements of Postmasters-General with reference thereto.

"When this is done it seems that no doubt can remain that Congress intended that not the whole number of days within the period of weighing should be used as a divisor, but the number of working days within such period. Such examination will show, I think, that under conditions where there are railroad mail routes upon which there is both week-day and Sunday service and week-day service alone, the specific language of the statute requiring a weighing to be had for a number of "successive working days" is practically meaningless unless it governs to that extent the manner of computing the average daily weight. It will also show that the long-established practice of the Department, under the laws which were superseded by the act of 1873, was to classify railroad

service upon that basis; that the law of 1873 in this respect practically adopted the practice which had theretofore so obtained, and that the actual administration of the law from the time of its passage was a continuation of the methods so adopted. * * *

"In order to more accurately determine the "size of the mails" so conveyed, the Post-Office Department issued in 1867 to railroads a "railroad weight circular," requesting them to weigh the mails for "thirty consecutive working days" and report the results to the Department, together with description of accommodations furnished, etc. The majority of the railroads complied with the request (Report of the Postmaster-General for 1867, pp. 10, 11). Computations of the average daily weight were made upon these returns (pp. 72 to 91, inclusive). An examination of the departmental records and reports shows that the instructions were to weigh for "thirty consecutive working days," and that in computing the average daily weight thirty was used as a divisor; therefore, the weights were taken for every day of the period measured by the "thirty consecutive working days," including the Sundays, but the divisor was thirty or the number of consecutive working days.

"The results of this weighing and computation became the basis for the first readjustment by classes, determined by the average daily weight, under the law of 1845. * * * (See Report Postmaster-General, for 1868.)

"At the time of this weighing and first readjustment upon this basis, as well as at all subsequent times, there was a week-day

and Sunday service upon some routes and week-day service only upon others. * * *

"The first weighing under the law of 1873 began October 1, 1873, and was ordered for "thirty consecutive working days." (Report of Postmaster-General, 1874, p. 8.) The returns were received, and the computations and readjustments were made under the provisions of the law (pp. 108 to 183, inclusive).

"In making these computations and adjustments the divisor used was the same as that which had theretofore been used, namely, thirty days. The reports and records for the succeeding years show the same character of weighing and the same manner of computation and adjustment.

"It is apparent from these facts that the same system of weighing the mails and of computing the average daily weight upon the returns for a certain number of "consecutive working days," which had obtained in the Department for years before the passage of the law of 1873, was practically adopted by that law and continued without change in the administration of the same. For this we have not only the logic of the facts, but the statement of the Second Assistant Postmaster General for the year 1878, who states on page 61 of his report: "In 1867 the service rendered by railroad companies was gauged by the system substantially embodied in the act of 1873."

"It should be borne in mind that the whole question of proper compensation to railroads for carrying mails was before Congress at two different times during this

period, upon which occasions reductions in the rates were made. By the acts of July 12, 1876, and June 17, 1878, Congress reduced the rates as provided for by the act of 1873 by a flat reduction of 10 per cent and 5 per cent, respectively. I think it must be assumed that such action could not be taken by Congress without thorough information upon the subject in all its details, including the construction placed upon the act of 1873 by the executive officers and the details of administration, yet the reduction effected was by a flat rate of deduction and not by any change in the law which would necessitate a different construction and practice with reference to the manner of computing the average daily weight. * * *

* * * * *

“In the practice of the Department, railroads which do not carry mails on Sunday are held to be entitled, under the decision of the Attorney-General and the long-prevailing practice, to have all mail matter originating and accumulating during Sunday added to the Monday tabulation of weights, for the reason that weighing of the mails must be constructively on working days, and therefore mails carried on Sunday are mails which otherwise would be carried on Monday and which, if railroads did carry on Monday, they would receive *pro rata* compensation for. If any other practice were adopted with reference to this six-day a week service, it is apparent that if Sunday service were inaugurated upon such routes

and the mails were dispatched upon Sunday trains and thereby reached destination earlier than they otherwise would, notwithstanding the Department would gain by this expedition of the mails, the railroads would lose by having the average weight reduced by a divisor of seven instead of six."

Whatever room for argument there may have been prior to March 3, 1873, as to the quality of the power of the Postmaster General in adopting methods or means of ascertaining the "size" of the mails in classifying same for purposes of compensation, we think no true room for any such argument existed subsequent to that date to and throughout the quadrennial period here in question, for by the act of said date (17 Stats., 556, 558), which crystalized in statute form the practice inaugurated in 1867 and thence continued, the Postmaster General was mandatorily, not directorily, as the Government argues, required "in every case" to ascertain the average weight per day carried the whole length of the route "by the actual weighing of the mails for such a number of seccessive *working* days (not successive days), not less than thirty, at such times * * * not less frequently than once in every four years * * * as the Postmaster General may direct.

It is of course manifestly impossible to weigh the mails for not less than thirty "successive" *working* days without extending such weighings

over a period of more than thirty successive days, and such a period of necessity would include five non-working or Sabbath days on which Sabbath days' mails might or might not be carried according to the practice of the carrier particularly concerned. If no mails should be carried on such Sabbath days then the mails which originated or accumulated on such days manifestly would be incorporated into the mails carried on Mondays and the carrier would advantage by the weight thereof when the total weight carried throughout the period came to be divided by the number of the working days, customarily 30 later and now 90, embraced therein. If any particular road actually carried mails on Sundays, thereby adding something to expedition, it is manifest that unless the weight of such so-called Sunday mails should be ascertained and incorporated into the whole weight carried, the Government would be benefiting by a voluntary and uncompensated service, a result expressly forbidden by the act of March 3, 1905, Ch. 1484, sec. 4, 33 Stats., 1257, amended, February 27, 1906, Ch. 510, sec. 3, 34 Stats., 48, both of which declare that "any person violating any provision of this action (*i. e.*, accepting voluntary service for the Government) *shall be summarily removed from office* and may be punished by a fine of not less than one hundred dollars or by imprisonment of not less than one month," a sad situation for the Postmaster Gen-

eral of the United States to find himself in if the suggestion of some that literalism prohibits the inclusion of Sabbath day weights in "working day" averages, be well founded.

In 1873 and before, it was common knowledge that the weight of so-called Sunday mails as compared with "working day" mails was small, even slight. This did not and does not result from the operation or non-operation of mail trains on such days, but does result from the custom of a God-fearing and religious people to cease from accustomed labors on that first day of the week commonly called Sabbath. But such cessation primarily affects only the origination of mails, for the mail which originated in New York on Sunday becomes an integral part of the Monday or Tuesday mails through Pittsburgh and other intermediate points to Chicago and beyond. All mail routes throughout the country on some day of the week are appreciably affected by the general cessation of both public and private business on that day. As a fair average of daily weights is presumptively the measure of the compensation which the Government intended to pay for the carriage of all the mails, and as the cost of service to the carrier with respect to any specific postal route is approximately the same day by day, whether the weights carried be greater or less, it is plain that the average upon which to base

compensation for service rendered is both unduly and unfairly lessened by including in the statutory divisor of "working days" a non-working day, on which notoriously the machinery of commercial and social intercourse is at rest. In this connection we refer to Executive Doc. 910, 60th Congress, 1st Session, page 21 *et seq.*, which exposes the results of weighings "by classes" for six months, July to December, 1907. From this it appears that the first class mail, that is, letters and post cards, constituted but 12.81 per cent of all mail matter transported, and by 7.29 per cent of all such mail matter with the bags enclosing same and sent therewith. As mail matter originating on Sundays consists substantially if not almost entirely of letters, and those generally of a social character, it is readily perceived that the weight of the mails originating on Sunday would in all probability not exceed—if indeed it even approximates—three (3) per cent of the customary weight of the mails originating on a normal working day.

As casting light both on this wide discrepancy in weight between a normal Sunday and a normal "working day" mail, and also upon the sedulous inclusion by the Congress between 1873 and 1905 of the mandatory requirement that the *average* daily weight carried should be ascertained in every case by the actual weighing of the mails for not less than 30 or 90 "successive working days," we in-

voke the inspiring language of this Court spoken in the case of *The Church of the Holy Trinity vs. United States*, 143 U. S., 457, as follows:

“* * * this is a religious people. This is historically true. From the discovery of this continent to the present hour there is a single voice making this affirmation. * * *

“Coming nearer to the present time, the Declaration of Independence recognizes the presence of the Divine in human affairs in these words, * * *

“If we examine the constitutions of the various States we find in them a constant recognition of religious obligations. Every constitution of every one of the forty-four (now forty-nine) States contains language which either directly or by clear implication recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well being of the community. * * *

“Even the Constitution of the United States * * * also provides in Article I, section 7, (a provision common to many constitutions) that the Executive shall have ten days (Sundays excepted) within which to determine whether he will approve or veto a bill.

“There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons; they are organic utterances; they speak the voice of the entire

people. While because of a general recognition of this truth the question has seldom been presented to the courts, yet we find that in *Updegraph vs. Com.*, 11 Serg. & R., 394, 400, it was decided that Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania.
* * *

"If we pass beyond these matters to a view of American life *as expressed by its laws, its business, its customs and its society*, we find everywhere a clear recognition of the same truth. Among other matters note the following: * * * *the laws respecting the observance of the Sabbath; with the general cessation of all secular business, and the closing of courts, legislatures, and other similar public assemblies on that day* (italics supplied).

* * * * These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation."
* * *

These solemn and general declarations made advisedly by this Court in the year of Grace 1892 are pertinent and should prove to be most persuasive when coming to finally consider for purposes of construction and interpretation the provisions of the acts of 1873 and 1905.

In this aspect of the matter it would seem that both the Court below and the learned Government counsel have stressed too greatly the matter of

Sunday mail train service, and the relative number of railroads which in 1873 moved mails on Sundays as compared to the relatively greater number of such roads now operating. Such matters, in our view, are wholly irrelevant in any close discussion of the point at issue.

Its immateriality in the instant case is manifest upon considering Finding of Fact wherein the trial Court found that in 1873 "a *majority* of the railroad postal routes carried the mails six days per week, so as to make six round trips per week, and did not carry mails on Sundays," and also found in the second paragraph of the same finding that of the forty-one (41) postal routes operated by appellant and involved in this case "after Order 412 was promulgated and became effective" twenty-four (24) were and are six-day routes while but seventeen are seven-day routes.

In so far as the rights of this appellant to statutory compensation, based upon the average weight of mails per day carried, such average weight to be ascertained in every case by actual weighings for not less than 30 or 90 "*successive working days*" may be concerned, of what consequence is the finding that at the date of promulgating Order 412, *i. e.*, June 7, 1907, "over a majority of the railroad postal routes mails were being carried every day in the week." Such fact, if true, could not have the

effect of enlarging the statutory phrase, "successive working days," identical in both the act of 1873 and of 1905, to include days which in ordinary speech and to the common understanding are not "working" days.

As said elsewhere by others, if the Congress had intended that "the whole number of days included in the weighing period" (either 35 or 105) should be used as the divisor to obtain the average daily weight of mails carried, it would have been sufficient and shorter to have used only "successive days" omitting all reference to the qualifying adjective "working." As the adjective or qualifying word was reiterated by the Congress in spite of some objection and much debate it would be to ignore a familiar and fundamental rule of statutory interpretation to refuse to accord it not only recognition but its well-established meaning.

It constitutes a term of art—familiar to judicial tribunals through long usage, frequently appearing in solemn documents and well understood by a religious people at large.

THE STATUTES.

The act of March 3, 1845 (5 Stats., 738), which first imposed upon the Postmaster General the duty of arranging and dividing the railroad routes into the three classes above specified, expressly declared

that such duty was so imposed "to insure, as far as may be practicable, an equal and just rate of compensation, according to the service performed, among the several railroad companies in the United States for the transportation of the mail." A requisite element of inclusion in the "First Class," under the practice of the Post-Office Department, established in connection with said act of 1845 and since continued to the present time, was a basic service of not less than six round trips per week, or an average of at least one round trip for each and every secular or working day in each and every week, and consequently at least one round trip for each and every secular or working day in each and every year. This practice and the custom based thereon also involved, as another essential element, the agreement by the Postmaster General to pay and the actual payment by him to the railroad companies of the first class of the highest rate of pay or compensation provided and allowed by the current law for a service of not less than six round trips a week, the remaining elements of "speed" and "importance" being likewise present. The practice and custom so established persisted throughout the period covered by the findings of fact in this case. As reported by the Postmaster General to the Congress in 1867, no very definite attempt had been made up to that time to ascertain with reasonable certainty the "size" of the mails transported.

To arrive at this, the then Postmaster General issued to the railroad companies transporting the mails a so-called "weight circular," at the same time requesting the companies to weigh all mails carried by them "*for thirty consecutive working days*" (italics supplied), and report the results to him. The practice of ascertaining the size or average daily weight of mails carried thus originated and established, persisted and continued despite occasional question, until promulgation on June 7, 1907, of the Departmental Order No. 412, hereinafter referred to. From the date of its origin to date of enactment of the statute of March 3, 1873 (ch. 231, 17 Stats., 558), its modification and possibly the elimination of one or more of the elements adopted by the Postmaster General under the authority conferred upon him by the act of 1845, as bases for classification of the various railroad companies transporting the mails, might have been discretionary with him. But we venture to think that, upon the enactment of the act of 1873, such discretion in so far as it had formerly extended to the method of ascertaining "size," disappeared with the elimination by that act of the previously existing duty to divide such companies into three classes.

The element of "speed" in the act of 1845 became translated in the act of 1873 into the composite requirement of "due frequency and speed," and the

separate elements of "size" and "importance" were resolved into the composite expressed as the average weight of mails per day carried the whole length of the particular route. But, while the act of 1873 provided "that the pay per mile per annum shall not exceed" certain amounts expressed in dollars on routes carrying their whole length an average weight of differing numbers of pounds, thus conferring upon the Postmaster General a discretion to make contracts at rates less than the maxima stated in the statute, if he should be able so to do (*Eastern Railroad Co. vs. United States*, 20 Ct. Claims, 41 affirmed 121 U. S., 391; see also opinion, per Campbell, Ch. J., on *Chicago & Alton Case*, 49 C. of C.), the previous discretionary method of ascertaining the "size" of the mails carried became crystallized in the statutory rule which required "the average weight to be ascertained in every case by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times, after June 30, 1873, and not less frequently than once in every four years, * * * as the Postmaster General may direct."

The United States do not deny that the definition "due frequency and speed," since the enactment of the statute of 1873 to the present time, has been held in the Post-Office Department entirely

satisfied by a basic service of "not less than six round trips per week." Nor do they deny that from the date of the enactment of said statute even as theretofore, and until the promulgation of said Departmental Order on June 7, 1907, the practice of the Department in ascertaining the average weight of mails per day carried throughout the whole length of any particular route was invariably to ascertain by actual weighings the aggregate total in pounds of all mails so carried during certain so-called weighing periods consisting of thirty-five, or, as later, one hundred and five, successive days, and to divide the aggregate total weight so ascertained by thirty or ninety, as representing the total number of *successive working days* included within such respective weighing periods. In compensation for such a service, the maxima prescribed by law were uniformly applied to the *statutory average* weights per day carried thereby ascertained thus establishing the rate of compensation to be paid therefor, no note being here taken of the occasional and unusual services called "agreement" service, "blue tag," "lap," and "equalization" services.

The change in the practice of ascertaining the average weight per day carried, from a weighing period of "not less than thirty" to a weighing period of "not less than ninety," was brought about by the enactment of the act of March 3, 1905 (33

Stats., 1088), which declared "that hereafter, before making the readjustments of pay for transportation of mails on railroad routes, the average weight *shall be ascertained* by the actual weighing of mails for such a number of *successive working days*, not less than ninety, and at such times after June 30, 1905, and not less frequently than once in every four years * * * as the Postmaster General may direct." (Italics supplied.)

Apart from the provisions of the act of March 3, 1875 (ch. 128, 18 Stats., 341), which directed the Postmaster General "to have the mails weighed as often as now provided by law *by the employees of the Post-Office Department*, and to have the weights stated and verified to him by said employees under such instructions as he may consider just to the Post-Office Department and the railroad companies," and the act of July 12, 1876 (ch. 179, 19 Stats., 79), which directed the Postmaster General to readjust the compensation to be paid after July 1, 1876, "by reducing the compensation to all railroad companies for the transportation of mails ten per centum per annum from the rates *fixed and allowed* by the 1st section of" the act approved March 3, 1873 (*supra*), "for the transportation of mails on the basis of the average weight," and the act of June 17, 1878 (ch. 259, 20 Stats., 142), directing the Postmaster General to readjust compensa-

tion to be paid after July 1, 1878, "by reducing the compensation of all railroad companies for the transportation of mails five per centum per annum from the rates for the transportation of mails, on the basis of the average weight *fixed and allowed* by the 1st section of" the act approved July 12, 1876 (*supra*), no pertinent legislation intervened between the acts of 1873 and 1905 referred to.

The attempt on the part of the Postmaster General by Departmental Order 412 to alter this method, long established both by statute law and practice, of ascertaining the average daily weight of mails carried, crystallized as it had come to be by at least three separate exercises of legislative authority, was an attempt on the part of the Postmaster General to do that which he had no legal power or authority to do, and the concrete expression of such attempt as formulated in Order 412, was and rightly should be held to be without valid effect upon the relations between the United States, acting through the Department, and this claimant respecting the amount of compensation to which the latter is entitled for the transportation of the mails during the term 1909-1913.

For at least six years prior to March 3, 1873, that is from February or March, 1867, the method of ascertaining the average daily weight of mail carried throughout the whole length of the route, by weigh-

ing all mails carried in each direction on every day including Sundays, when carried on that day, and dividing the aggregate total by the number of working or secular days only, never including Sundays, embraced in the weighing period then of thirty-five days, had prevailed. This customary, and as we think invariable practice, was well known to and sanctioned by the Department officials charged with the official duty of administering the then mail pay appropriations. The accounting officers for the Post-Office Department and of the Treasury never interposed objection to it. The "average daily weight of mails carried" so ascertained was the foundation or keystone of the whole mail pay system, for much less consideration was paid to the items of "speed" and "importance" than to "size" and the consistent custom of the Department from the early days was to pay in each case the maximum amount authorized for the particular class, whether "first," "second," or "third." The reasonableness of this method as tending to give to the carriers an "equal and just compensation, according to the service performed," in accord with the policy of the Congress declared in the acts of March 3, 1845, and June 8, 1872, had become so fully demonstrated to the satisfaction of both the Department and the Congress, that the latter, acting upon the reports and recommendations of the former, enacted the act of March 3, 1873 (incorporated in

the Revised Statutes as section 4002), substituting "due frequency and speed" in place of "speed" and "importance," and "average weight of mails per day" carried the whole length of the route for "size," and required such "average weight to be ascertained *in every case*, by the actual weighing of the mails for a number of successive *working* days, not less than thirty," etc., etc., and subsequently enacted the act of March 3, 1875, ch. 128, 18 Stats., 341, which directed the weighings to be done "by the employees of the Post-Office Department," and the weights so ascertained to be "stated and verified" by such employees to the Postmaster General "under such instructions as he may consider just to the Post-Office Department and the railroad companies."

Excepting only for the enlargement of the weighing period by the substitution of "ninety" in place of "thirty" which was done by the act of March 3, 1905, 33 Stats., 1088, the Congress of the United States not only failed to enact any legislation in anywise tending to amend or alter either the act of 1873 or 1875 or the established custom and practice of the Post-Office Department officials specifically charged with the administration of all such laws, but as further manifesting its perfect understanding and appreciation of the situation as it had existed and been continuously handled for a

period of more than a third of a century, when urged to amend the earlier statutes or by enactment to alter the established custom and practice followed in their administration, as it was repeatedly urged to do, it definitely and positively, as amply appears from public documents, particularly reports of its committees, refused to do so. Under those laws, customs, and practices the quotient arrived at and used as evidencing the "average weight of mails per day" carried, was from the beginning and without interruption until June, 1907, continued as the very basis of railway mail pay adjustment and compensation. Such quotient by statutory definition was the equivalent of the "average" daily weight carried. The fact that the statutory "daily average" differs from the mathematical "daily average" is of no consequence, for the rights and obligations of the parties here rest upon and inhere in the statute and do not depend upon arithmetical precision or the usage of rhetoricians.

This departmental and statutory method of ascertaining the "average weight of mails per day" carried, which persisted without variation from 1873 to 1907, constituted not only a component element, but the very basic element, of compensation in every contract between the Postmaster General and carriers transporting the mails, excepting only

some occasional contracts specifically evidencing the intention of the parties thereto to secure and perform service upon other or different bases than those fixed and prescribed by the general statute law and practice. The case at bar presents no such feature.

Even more specific and definite recognition and confirmation by Congress of this custom of the Department and of the construction and application made by it of the acts of 1873 and 1875 in practice, is found in the provisions of the act of July 12, 1876, 19 Stats., 79, "reducing the compensation to all railroad companies for the transportation of mails ten per centum per annum from the rates *fixed* and allowed by the first section of" the act of 1873 above, and in the act of June 17, 1878, 20 Stats., 142, again directing the Postmaster General to reduce the compensation to be paid to railroads transporting the mail after July 1, 1878, by "five per centum per annum from the rates for the transportation of mails, on basis of the average weight *fixed* and allowed by the first section of" the act of 1876 next above referred to. In these statutes the then and previously current bases of the compensation to be allowed and paid to railroad companies by the Post-Office Department are defined as the rates "fixed" and the average weight "fixed" in and by the earlier statutes specified.

Conceding, for the purpose of this argument, that neither the act of 1873 nor all of the statutes above specified as amendatory thereof, nor the invariable custom and practice of the Department existing between 1873 and 1907 in administering the same, nor all thereof combined, established an absolute rate of compensation, but merely maxima which could not be exceeded, leaving to the Postmaster General a discretion to make contracts at less than such maxima if he should be able to do so, it is certain that such discretionary power inhered in and pertained to the single element of the maximum applicable in any particular contract, and did not at all inhere in or pertain to the method to be pursued in ascertaining the average daily weight of mails carried to which as a basis the rate agreed upon, whether the maximum or less, was to be applied in arriving at the annual compensation to be paid.

As said by the Court of Claims in its learned opinion, filed in the Chicago and Alton Case (49 C. of C., 463), at page 502, analyzing the act of 1873:

“We find * * * (3) that a scale of maximum rates is given to be based upon the average obtained from actual weighings ‘in every case,’ for 30 or more successive working days; (4) that a rule for ascertaining an average weight per day is provided. This last marks a departure from the older law wherein no method of ascertaining ‘the size

of the mails' is provided, though it was required by the act of 1845 that it enter into the Postmaster General's computation in fixing pay for the service. It was as impracticable in 1873 and the years following to ascertain the size of the mails or their weight as it had been in prior years, except by constant weighings; and as the weight carried was necessarily considered a material element, a plan was adopted which was at once practicable and fair to the parties concerned. This plan amounted to discarding the idea of actual weights by providing a contract basis to be an average ascertained by a rule stated in the statute; and it will be observed that the statute directs the average weights to be ascertained 'in every case' by that rule.

"With the average weight carried daily throughout the route ascertained, the length of the route known, the right to 'increase compensation' given, and the maximum rate named, the Postmaster General was prepared to submit his proposal to each road with the conditions and terms provided in the act. Among the conditions named were that the mails be carried with 'due frequency and speed,' and that proper and suitable mail cars be provided.

"He was given a limit as to compensation to be paid, maximum rates being stated, and his contract was to be based upon an average weight of mails per day carried the whole length of the route and the ascertainment therefrom of the average weight carried per mile per annum.



“Since the statute mentions working days, come meaning should be ascribed to the terms. It would have shortened the phrase to have omitted the word ‘working,’ but it was inserted. Working days generally refer to secular days; that is, they exclude Sundays. It was said in a case involving the use of the term in a charter party: ‘The expression “working days” has in commerce and jurisprudence a settled and definite meaning; it means days as they succeed each other, exclusive of Sundays and holidays. The court gives this precise and formal definition in *Brooks vs. Minturn*, 1 Cal., 483.’ *Pederson vs. Engster*, 14 Fed. R., 422; *Field vs. Chase* (N. Y.), *Lalor’s Supp.*, 50. Working day is a day in which work is generally done in distinction to Sundays or holidays. Webster’s Dict. We may not find an entirely satisfactory reason for the use of the expression in said connection, and it is immaterial what the reason was if the meaning be clear. Congress certainly had the right to use it, and did so. At that time (1873) there were a great many more railroad routes carrying the mails six days per week than there were carrying them seven days per week. We are told the proportion was then 7 to 1, a condition very much changed since. It may, therefore, be that Congress recognized that by using the working days—or excluding Sundays—for weighings it was adopting days common to all the roads, and thus securing an average weight fairly representative of the service of all, the daily average being the factor desired. Or it may be that the suggestion was made that the railroads were

operated under charters granted by the States, which might claim the right to regulate or prohibit the running of Sunday trains, and that the authority from Congress to weigh the mails on Sundays might be construed as legislation by Congress in reference to the mails, a matter peculiarly within the province of the Federal Government, and as thereby interdicting any interference by the States with railroads operating their trains on Sundays while carrying the mails. Whatever the reason, Congress directed that the mails be weighed for such a number of successive working days, not less than 30, as the Postmaster General might direct.

“Having in mind the fact that prior to 1873 much difficulty had been experienced in determining ‘the size of the mails’; that actual weights could only be found by constant and actual weighings, which would be so expensive and inconvenient as to amount to impracticability, and that it was essential to have a basis upon which contracts for terms of four years could be made, *we can see a reason for adopting the plan of ascertaining an average weight and accepting that instead of actual weight.* * * * It should be borne in mind that the evident purpose of the statute was to furnish a plan whereby the average weights in distinction to actual weights could be found; that it was adopting a method under which the Government would be willing to make contracts extending for a long period; that certainty, even though based upon average weights, was preferable to uncertainty resulting from any other method; that this certainty of

average weight would furnish a basis for estimates for appropriations relieving the uncertainty of estimating weights or the variability of actual weights; and that it therefore provided a plan and furnished a rule which, *if literally followed*, would determine the (statutory) average weight per day.

“The statute authorized a readjustment of the compensation upon ‘the conditions and terms’ mentioned therein. One of these conditions is that in the matters of weights the statutory rule shall be used to find the average weight of the mails carried per day. The aggregate of ‘the actual weighings of the mails for such a number of successive working days not less than 30 * * *,’ as the Postmaster General may direct, furnishes the dividend, the number of successive working days so used furnishes the divisor, and the quotient is of course the (statutory) average daily weight of the mails carried on said days.

“At this point it is suggested by claimant that the foregoing rule might serve for six-day roads, but works an injustice to routes carrying mails every day of the week. Because, it is said, when the mails carried by six-day roads are weighed for 30 successive working days, it means that all of the mail carried throughout the week by such roads goes to make up the average—Sunday’s accumulation going into Monday’s mail and weight; while the seven-day roads carrying mails on Sunday do not get the benefit of its weight in this average. At first view this contention may seem to have merit, but in

reality it is unsound when the whole statute is considered.

"Congress knew when it enacted the statute that some routes were seven-day and some six-day routes, and yet it provided a rule which it declared should be applied 'in every case' by actual weighings of the mails for a number of successive working days. But chiefly the vice of said contention is that, in order to show the supposed inequality produced by the rule stated specifically in the statute, the emphasis is laid upon the wrong feature. The statute itself considered as an entirety answers the contention, for it provides that, among the terms and conditions upon which the mails are to be carried, there shall be prominently considered the 'frequency' with which they are conveyed and that the price to be paid shall be within a named maximum price. In other words, the latitude given the Postmaster General within which to 'readjust' the compensation so as to comply with the terms and spirit of the act of 1873 is not found in a disregard of the rule for finding the average weight, but is found in the price to be paid. He may pay on the basis of 'due frequency' of carriage to seven-day roads a larger amount for the average daily weight per mile per annum than he pays a six-day road. He may pay one for 365 days and the other for 313 days per annum. And this can be done because of the flexibility of the provisions fixing the compensation without doing any violence to any terms of the statute."

Whatever latitude respecting "rates" based on "due frequency" may have been reposed by the statute of 1873 in the Postmaster General, it is certain that he did not exercise same, at least up to 1907, for the purpose of distinguishing in matters of compensation the service of the seven-day roads from that rendered by the six-day roads. As is cordially admitted by the United States, and as is clearly demonstrated by numerous reports, the element of "due frequency and speed" was to and throughout the period with which this case is concerned uniformly held satisfied by a service of six round trips per week. With this feature or element of the formula for deducing the amount of compensation to be paid, the Congress did not concern itself when enacting the *proviso* to the act of 1905.

It may well be conceded, as it must be from a mere reading of this proviso, "that Congress was not satisfied with the average weights being ascertained, * * * and they therefore changed the law to insure a more satisfactory average," but the change required was particularly "cribbed, cabined and confined." It lengthened the period of the weighings, but made no change either in the elements to be considered or in the manner of their ascertainment.

It is certain that an amendatory statute designed to change a *feature* in or practice under an older act

should be construed so as to give it the effect intended, but when the amendatory provisions deal only with one of the several features inhering in the older act, it is equally certain, upon fundamental principles of statutory construction, *e. g.*, *expressio unius*, etc., that the alteration defined leaves all other elements as they were.

Though the weighings were to be conducted over a longer period, the average weight to which the statutory maximum was to be applied in determining the annual compensation remained as theretofore, to be (shall be) ascertained by the statutory rule of dividing aggregate totals, not by the whole number of successive days upon which weighings were had but only by the "number of successive working days" not less than the statutory "ninety" embraced in the weighing period.

Refusal of Appellant to submit to the terms of Order 412 was formally communicated to the Postmaster General prior to rendering any of the service here involved and such refusal was not subsequently withdrawn or qualified.

But conceding *arguendo* that discretion as to the "rates" remained with the Postmaster General, and that upon the basis of "due frequency and speed" differing rates within the maxima prescribed by the statute might have been agreed upon between the parties, same being acceded to by the railroad, where lies the right of the matter when the

carrier in ample season has declined to contract at any "rate" less than the maximum to be applied to an average daily weight carried ascertained in accord with the previously accustomed practice of the Department?

In the Chicago and Alton case (*supra*), it was found that although notified by the Postmaster General in February, 1907, of intention to apply after July 1, 1907, a lesser rate than had theretofore prevailed, the carrier, beginning July 1, 1907, continued to receive and transport the mails as previously, without refusal or objection until September 16, 1907, when, upon returning the Distance Circular with acceptance clause duly signed, it casually excepted to the application of Orders 165 and 412, the latter being, in fact, a mere substitution for the former.

October 3, 1907, the Second Assistant Postmaster General, in writing, by way of reply, stated that claimant "in the performance of the service from the beginning of the contract term and during the continuance of the service, would be subject to all the postal laws and regulations," including Order 412, and payments thereafter were made and accepted by claimant upon such basis. Upon this point the Court of Claims said:

"Conceding for the sake of argument that the claimant could have objected to Order 412, we think the objection should have been

timely and that some effect should be given to its action in entering upon the performance of the contract for carrying the mails without objection made before July 1, 1907, when the contract period commenced, if indeed the letter of July 1, 1907 (September 16, 1907), can be construed to be an objection. By holding the distance circular until September, and then returning it with 'exception' noted, claimant waived any right of objection, not only upon the principle stated in *Philadelphia & Baltimore R. R. Co. vs. United States* (103 U. S., 703) and *Texas & Pacific R. R. Co. Case* (28 C. Cls., 379), wherein it is said, 'The contract could not be changed by complaints and protests,' but also upon another principle, namely, that where an offer is made by one party its acceptance by the other may as well be signified by doing acts which clearly show assent as by express words, especially when there is a duty on the part of such a party to make known his unwillingness to proceed under the contract. 'If such acts are done with the knowledge of the party making the offer, they amount to an acceptance thereof.'

* * * *Vogel vs. Pekoe*, 157 Ill., 339; 30 L. R. A., 493, where it is said: 'The acceptance of the contract by the parties of the first part, and holding it and acting upon it as a valid instrument, may be regarded as equivalent to its formal execution on their part.'

In the absence of some controlling provision of law restricting the powers of one or other of the parties to a particular contract it would be futile

to deny or even attempt to argue away the reasonableness and authoritative quality of the principles of law so cited. That it was and is entirely competent for the Postmaster General in letting contracts for carrying the mails to attempt, by agreement, to secure the service at rates less than the statutory maxima we do not doubt. That an offer of business coupled with a statement that the rate of compensation to be paid for its performance would be less than the maximum rate prescribed by applicable statutes, and the acceptance of such an offer, either in writing or by performance of the business without objection made to the terms offered, would be sufficient to establish contractual relations between the parties, under which payment of compensation at less than the statutory maximum would constitute complete discharge, is no less certain. But the case now at bar does not involve any such proposition. Here the offer of business was at rates of compensation to be made at statutory maxima, but coupled with the proviso that the average daily weight of the mails carried should be ascertained in a manner other than that prescribed and required by such statutes to be used "in every case." In so proposing the Postmaster General, under the familiar rule of adjudged cases, *Morril vs. Jones*, 106 U. S., 466; *United States vs. Eaton*, 144 U. S., 677, exceeded his lawful powers, and such proposal

could neither bind those engaged in the performance of a service or duty prescribed by the statute, nor serve as a defense against an action to enforce the statutory duty to pay. In the Chicago and Alton case there was seeming acquiescence on the part of that company in the application of Order 412, though its provisions were unwarranted by statute, and such acquiescence was deemed by the Court of Claims to estop the company from thereafter protesting the effect of its own course of conduct. But no such consideration can arise here, for at the very first stage and long before the beginning of the quadrennial period—that is, prior to July 1, 1907—claimant had refused to be bound by what it was then advised and still believes to be an attempt on the part of the Postmaster General to himself amend a duly enacted law of the United States. For administrative officers of the Government so to undertake is not entirely without precedent in political history. But their inability to accomplish any such undertaking, when timely objection is made by one interested, is demonstrated by the cases last above cited.

The Railway Mail Service cases, 13 C. of C., 199, which involved questions as to the amount of compensation properly payable to a railroad company operating “lap service,” or two distinct postal routes over the same portion of its main line

between one terminal and a junction point, establish the principle that a company transporting mails under the act of 1873, "and accepting without objection less compensation therefor than is named in the statute," cannot subsequently recover the difference between the amount received and the statutory maximum allowable. Such conclusion is readily to be accepted, for, under the circumstances defining those cases, the tender and acceptance of the lesser amount constituted in effect an agreement to perform the specified service, which was an unusual or abnormal service, for less than what the statute declared normal service to be reasonably worth. The power to deal and contract, as above indicated, was well within the domain of the discretionary power concededly confided by the statutes to the Postmaster General. As no time contract covering the "lap service" there in question had been executed by the parties, the court further declared that from the date upon which the company announced its objection to the course theretofore pursued by the Department and acquiesced in by the company, payment should have been made at the rate prescribed by the statute as the allowable maximum, notwithstanding the company thereafter continued to perform service and accepted pay at the lesser rate which the Department had fixed; and judgment went in

favor of the company for the difference between the two.

The conclusion reached in Texas & Pacific Railway Company case, 28 C. of C., 379 (also a "lap service" case), though adverse to claimant and resulting in the dismissal of its petition, does not militate against the principles announced in the Mail Service cases (*supra*), for there the terms of the agreement were in writing, had been made "with a full understanding of the manner as to how the pay was to be adjusted," and the complaint subsequently made by the company against them had been formally withdrawn during performance. In disposing of the matter the court said (p. 389):

"The company was under no obligation to perform this service for any agreed period and could have refused to take the mails at any time. Complaining of the injustice of the contract (*sic*) did not annul it nor make another and different one in its place."

The court found that any protest or objection made by the company as to terms had been withdrawn by subsequent writings, and it having been fully paid in accord with its agreement as made, could not thereafter maintain its action to recover more than it already had received.

**Appellant Not Estopped by Receipt of Partial Payments
During Performance of the Service.**

In support of the proposition that claimants are not estopped from enforcing their demands in such regard by reason of having settled their accounts and accepted pay for service rendered upon a different basis, we cite in addition to the above the following:

Brown vs. Wheeler, 17 Connecticut, 345.

Rangely vs. Spring, 21 Maine, 130.

Jersey City vs. State, 30 N. J. Law, 521.

Johnson vs. United States, 5 Massachusetts, 425.

Newman vs. Edwards, 34 Pennsylvania St., 32.

In the absence of express Contract the Statutes cited, together with the statutory average of daily weights carried, furnish the true measure, both of defendant's liability and the carrier's lawful due.

Appellant through a period of years prior to 1908 had been performing service over the routes specified in its petition upon the terms prescribed by law and in strict accord with the then current orders and regulations of the Department. In the course of such performance, the Second Assistant Postmaster General on or about August 17, 1908, circulated the familiar Distance Circulars preparatory to the quadrennial period to begin

July 1, 1909. By letter of advice accompanying same he called attention to Order 412 and gave notice of intention to apply same in adjusting compensation for service to be performed during the quadrennial period then next approaching. Pursuant to the orders of the Department the weighings were effected over all routes specified in the Findings during the one hundred and five days beginning August 26, 1908. After the weighings had been completed claimant returned the Distance Circular completely filled in with data requested as to names of stations, distances between stations, junctions and the like, but unsigned as to its acceptance clause. With this Distance Circular thus partially executed claimant forwarded a separate writing bearing date of Novemehr 24, 1908, reading as follows:

“The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the existing regulations of the Department applicable to railroad mail service, excepting Order No. 412, issued by the Postmaster General, June 7, 1907. This company cannot accept as full compensation for services rendered the amount fixed according to the method of computation of average weight perscribed by said order, and reserves the right to insist on payment according to the methods of computing the average weight applied by the Department prior to the is-

suance of order No. 165, issued by the Postmaster General, March 2, 1907."

"W. H. NEWMAN,
"President.

"Dated Nov. 24, 1908.

"New York Central & Hudson River Railroad Company. Consolidated Nov. 1, 1869."

This clearly constituted refusal to perform service upon the terms offered.

On January 5, 1909, the Second Assistant Postmaster General replied to such refusal as follows:

Post-Office Department,
Second Assistant Postmaster General,
WASHINGTON, January 5, 1909.

Messrs. Thompson & Slater, Attorneys New York Central & Hudson River Railroad Co., Washington, D. C.

GENTLEMEN: This office is in receipt of your letter of January 2nd, accompanied by distance circular covering the following routes:

104025, Boston, Mass., to Albany, N. Y.
* * * (specifying others) * * * all
being for the term beginning July 1, 1909,
and ending June 30, 1913.

Note is taken of the modification made by you in the agreement clause in which you except Order No. 165, issued by the Postmaster General March 2, 1907, and Order No. 412 issued by the Postmaster General

June 7, 1907, and otherwise agree to perform service under existing regulations. In regard to this, I have to advise you that the Department will not enter into contract with any railroad company by which it may be excepted from the operation or effect of any postal law or regulation, and it must be understood that, in the performance of service, from the beginning of the contract term above named and during the continuance of such performance of service, your company will be subject, as in the past, to all the postal laws and regulations which are now or may become applicable during the term to this service.

Very respectfully,
JOSEPH STEWART,
Second Assistant Postmaster General.

This plain declaration of purpose was entirely capable of being officially adhered to if the Postmaster General chose so to do, for plainly a carrier cannot compel the letting to itself upon its own terms of a contract for mail transportation.

To this declaration of purpose complainant made no reply and the matter rested as it had before the declaration was made. If the essentials of contract were absent before this declaration of purpose of January 5, 1909, was made, as they clearly were, for there had been no consent on either side, equally clearly they were not supplied by the silence with which claimant met the Postmaster General's emphasized repetition of intent to compute compensation only on the basis of Order 412.

It was for the Postmaster General acting upon his own appreciation of the extent of his lawful powers to propose terms, and for claimant, not compelled by law to perform such service, to accept or reject the terms proposed as it saw fit. By its notice of November 24, 1908, the company's stand and purpose was as simply and plainly, and hardly less emphatically stated than was that of the Department in its reply of January 5. The negotiations, having reached an *impasse*, ended then and there with no contract agreed upon and each party free to pursue its separate way.

Even though in one aspect claimant's communication indicated willingness to perform the service upon other terms, such condition was rejected by the Department and acceptance of terms by either party, an essential to the establishment of any contract, cannot be spelled out of the correspondence between them.

Jordan vs. Norton, 4 M. & W., 155.

Routledge vs. Grant, 4 Bing., 653.

Duke vs. Andrews, 2 Ex., 290.

Lucas vs. Martin, 37 Ch. D., 597.

Eliason vs. Henshaw, 4 Wheaton, 225.

Bruce vs. Pearson, 3 Johnson, N. Y., 534.

Allen vs. Kirwan, 159 Penna. St., 612.

Weaver vs. Burr, 31 W. Va., 736.

Sec. 3 L. R. A., 94.

Corcoran vs. White, 117 Illinois, 118.

Lawson, Contracts, sec. 16.

Clearly no express contract had been completed between the parties and no further attempt was made on either side to effect one. The silence which attended receipt of the Second Assistant Postmaster General's letter of January 5, 1909, remained unbroken. Claimant continued performance of its then current contracts to June 30, 1909, and in ordinary course was paid according to law and the terms of such contracts. July 1, 1909, without more said the Postmaster General caused the mails of that day to be delivered at claimant's receiving stations and claimant without demur, recognizing their importance to the commercial and social world and its own relation thereto and reasonable duty in the premises, received, transported and made customary delivery thereof.

A new service was begun, without contract or particular agreement between the United States and appellant. Contractual relations arose out of the service performed, and the implied agreement is to pay its reasonable worth. This is established by the statutes and the antecedent practice thereunder.

It is suggested on part of the defendant, that out of its positive announcement that it would "not enter into contract with any railroad company" which refused to be bound by "any postal law or regulation" and that "it must be understood that

in the performance of service" claimant would "be subject," as in the past, to all the "postal laws and regulations which are now or may become applicable during the term," a renewal of the original offer which claimant had positively refused to accept should be deduced, and that the occurrences subsequent to July 1, 1909, then practically six months distant in time, with no intervening communication being had between the parties, should be taken as an acceptance thereof. Such an assumption, we venture to think, would be unwarranted in fact and cannot be demonstrated as matter of law.

In some cases acceptance of offer may be proved by consequent acts without more, but acts alone will not constitute acceptance where the party to be bound has expressly stated that he would not agree to the terms offered, *e. g.*, where one has notified another by letter that an apparatus would be removed unless that other agreed to hire its use for \$20 per annum, and the other replied that he would not pay more than \$10. Held, that the continued use of the apparatus did not constitute an acceptance of the offer or give rise to obligation to pay for such use at the higher rate.

Lamson, etc., Co. *vs.* Neil, 15 Daly (N. Y.), 498;

29 N. Y. St., 307.

Mere silence or failure to reply to an offer in writing will not constitute or tend to establish acceptance of offer,

Titecomb vs. U. S., 14 C. of C., 263.

Prescott vs. Jones, 14 Atlantic R., 352.

Royal Ins. Co. vs. Beatty, 119 Pa. St., 6; 2 Am. St. R., 622.

Rayson vs. Berkeley Co. R. Co., 26 S. C., 610.

Belthouse vs. Bindley, 11 C. B. N. S., 869.

Subsequent to July 1, 1909, plaintiff received from the Second Assistant Postmaster General a communication in writing, as follows:

Notice to Company of Adjustment of Pay, Including R. P. O.

Division of Railway Adjustments.

D. H. M.

Post-Office Department.

Second Assistant Postmaster General.

WASHINGTON, July 1, 1909.

SIR: The compensation for the transportation of mails, etc., on Route No. 104025, between Boston, Mass., and Albany, N. Y., has been fixed from July 1, 1909, to June 30, 1913 (unless otherwise or-

dered), under acts of March 3, 1873, July 12, 1876, June 17, 1878, March 3, 1905, and March 2, 1907, upon returns showing the amount and character of the service for a number of successive working days, not less than ninety, commencing Aug. 26, 1908, at the rate of \$305,253.67 per annum, being \$1,523.45 per mile for 200.37 miles, * * *

No reference was made in this communication to Order 412, and as it was expressly declared that the compensation for the service to be rendered from July 1, 1909, to June 30, 1913, was based and fixed upon the statutes specified and "upon returns showing the amount and character of the service for a number of successive working days, not less than ninety, commencing August 26, 1908," no intimation that Sundays had been included in the divisor being given, claimant had no cause or reason to complain of or offer objection to the form of the notification.

Subsequent to July 7, 1909, claimant likewise received railway pay orders in the usual form which made no reference to Order 412 and furnished no data purporting to indicate that the previous practice of the Department in computing the pay per annum per mile had been departed from.

On the contrary the context of each of such papers, taken as a whole, seemed to express com-

plete acquiescence by the Department in appellant's contentions.

That such was not the case could only have been ascertained upon comparison of the rate in dollars per mile specified as the basis of pay with the total gross weights carried, which was not stated in any of those papers.

Throughout the entire period ending June 30, 1913, claimant rendered the service requested and prescribed in said pay order. Having ascertained that the figures contained in such order did not in fact accord with the promise of the statutes cited in the notification of compensation as fixed, but were in fact the result of an application to the statutory promise of the formula supplied by Order 412, claimant brought this suit to recover the differences due it, basing its right so to do upon the obligation and promise of the statutes themselves.

In the circumstances the United States, upon familiar principles, frequently applied in this forum, became obligated to pay what the service which it had requested to be performed for its own benefit, was reasonably worth. The origin of such obligation is readily found in the statutes which have already been referred to with much reiteration, and the duty to pay in accord with such obligation is statutory and can neither be gainsaid nor

frittered away. The rights and obligations of the parties were quasi contractual.

The statutes above cited and the uniform practice and custom of the Department for more than thirty years in applying them in daily and hourly practice furnish all the guide and rules necessary for the formulation of judgment herein. The statutory declaration of specified maxima is a plain index of the legislative understanding and appreciation of what in the particular circumstances and in the absence of Departmental dickering or mutual assent, constitutes reasonable compensation. Claimant had for many years previous to July 1, 1909, been rendering the identical service upon the identical routes and had been paid therefor upon the bases prescribed by the statutes, and expressly assented to by the Postmaster General as well as by itself. In such circumstances we turn with confidence to the principles announced by this court in the Eastern Railroad Company's case, 20 C. of C., 23, wherein Chief Justice Richardson, speaking for the court, having first declared (p. 41) that R. S. U. S., 4002, embodying the act of 1873, did not establish "an absolute rate of compensation, necessarily alike to all railroads, for mail transportation, but fixes maximums which are not to be exceeded, leaving the Postmaster General a dis-

cretion to make contracts at less rates if he should be able to do so," said (p. 42):

"Much reliance on the part of the claimant is placed upon the opinion of the Supreme Court in the case of *Railway Co. vs. United States* (101 U. S. R., 543). But in that case no question was involved as to whether or not there was a contract for a definite period of time. That action was brought by the United States against a railroad company to recover a tax imposed by statute on 'every * * * corporation owning * * * any railroad * * * engaged or employed in * * * transporting the mails * * * upon contracts made prior to August 1, 1866.' The Supreme Court say:

"'No express contract for carrying the mails was proven, but since the service for which the compensation was paid began before August 1, and was continued without interruption for the whole term in question, the court below implied a contract prior to that time. This, we think, was right. Had payment been refused and suit brought against the United States in the Court of Claims to recover for the service rendered, there could be no doubt about the right to recover, notwithstanding the jurisdiction of that court is confined to suits on contracts (*Salomon vs. United States*, 19 Wall., 17); and this not alone because the service had been rendered, but because it is to be presumed that when the company commenced the transportation it had been agreed that payment should be made for what was done.'

"So in this case it is to be presumed that

when the company commenced the transportation of the mails, July 1, 1877, it had been agreed that payment should be made for what was done and nothing more. So long as the Postmaster General furnished the mails and the claimant continued to carry them, an implied contract existed, which might be terminated at any time by either party. The implied compensation was the reasonable worth of the service, and that might be measured by the previous dealings of the parties for like service and the statutes regulating the same. The maximum rate fixed by statute would no doubt be considered the reasonable and implied compensation until the Postmaster General should make other terms, with the concurrence, express or implied, of the claimant."

This case was cited with approval in Jacksonville, Pensacola & Mobile R. Co. *vs.* United States, 21 C. of C., 155 (affirmed, 118 U. S., 626), where it is said:

"There is some difference between the land-grant railroad companies and other railroad companies as to their obligations in carrying the United States mails which has been mentioned in decided cases and which it may be well to note.

"While the land-grant companies are bound to transport the mails at prices fixed by Congress, those roads which are aided with bonds are entitled to fair and reasonable compensation not in excess of the rates paid to private parties for the same kind of

service. (Union Pacific Railway case, 20 C. Cls. R., 70.) But both are obliged to perform the service. Other companies are not bound to perform the service at all against their will. When they perform service without express contract their compensation depends wholly upon implied contracts to be inferred from and interpreted by the general laws of Congress and the regulations, orders, and practice of the Post-Office Department and other attending circumstances, as in the Eastern Railroad case, before cited."

In holding that a statutory maximum was the measure of reasonable value of a carrier's service, Lord Watson, in *Manchester, Sheffield, &c., Ry. Co. vs. Brown*, L. R. 8 Appeal Cases, 715, said:

"*Prima facie* I am prepared to hold that a rate sanctioned by the legislature must be taken to be a reasonable rate."

In the later case of *Great Western Railway Co. vs. McCarthy*, L. R. 12, Appeal Cases, 218, 235, referring to the earlier case, he said:

"A rate sanctioned by act of Parliament is a legal rate, which the company can exact from all who employ them to carry, unless they have disabled themselves from making the charge by conceding terms unduly favorable to some of their customers. Until it is shown that they cannot lawfully charge the statutory rate, it must, in my opinion,

be regarded not only as lawful but as reasonable."

See also

Jenkins vs. National Association, 111 Georgia, 734.

Thompson vs. Sanborn, 52 Michigan, 141.

The distinction respecting those cases pointed out in *Atchison, T. & S. F. R. Co. vs. United States*, 225 U. S., 640, does not apply here, for there objection to the proposed terms of compensation was not made by the company until after service had been begun and when made elicited immediate reply to effect that the proposed terms would be adhered to and none others would be accepted. Here the refusal to perform service upon the terms offered was complete before the tender of the mails by the Postmaster General, which, without more said, initiated the quasi or constructive contractual relations which underlie this action between the parties.

It may be suggested that the payments already made constituted full accord and satisfaction and that claimant cannot pursue with success his present demand, even though upon the strength of the above decisions it would appear that it had not received its full deserts, but, as before said in this brief—it is elemental that in cases of money obli-

gations a larger debt is not discharged by the payment of a lesser sum, and this even though the creditor should give an acquittance in full.

United States *vs.* Bostwick, 94 U. S., 53, 67.

Fire Insurance Asso. *vs.* Wickham, 141 U. S., 564.

Murdock *vs.* District of Columbia, 22 Ct. Cl., 464, 472, *aff'd.*

Kiskadden *vs.* United States, 44 Ct. Cl., 205, 219.

It is respectfully submitted that the attempt on part of the Postmaster General to alter the customary rates of compensation for carrying the mails, not by contracting or attempting to contract with carriers at prices per mile per annum less than the maxima prescribed by statute and invariably applied, but by departing from the mandatory requirements of the statutes in ascertaining the average weights of mails carried per day, was futile and, in the absence of an express contract to the contrary, appellant is entitled to recover for the service which it performed compensation at the rates per mile per annum which the Congress so particularly prescribed.

The judgment of the Court of Claims is erroneous and should be reversed.

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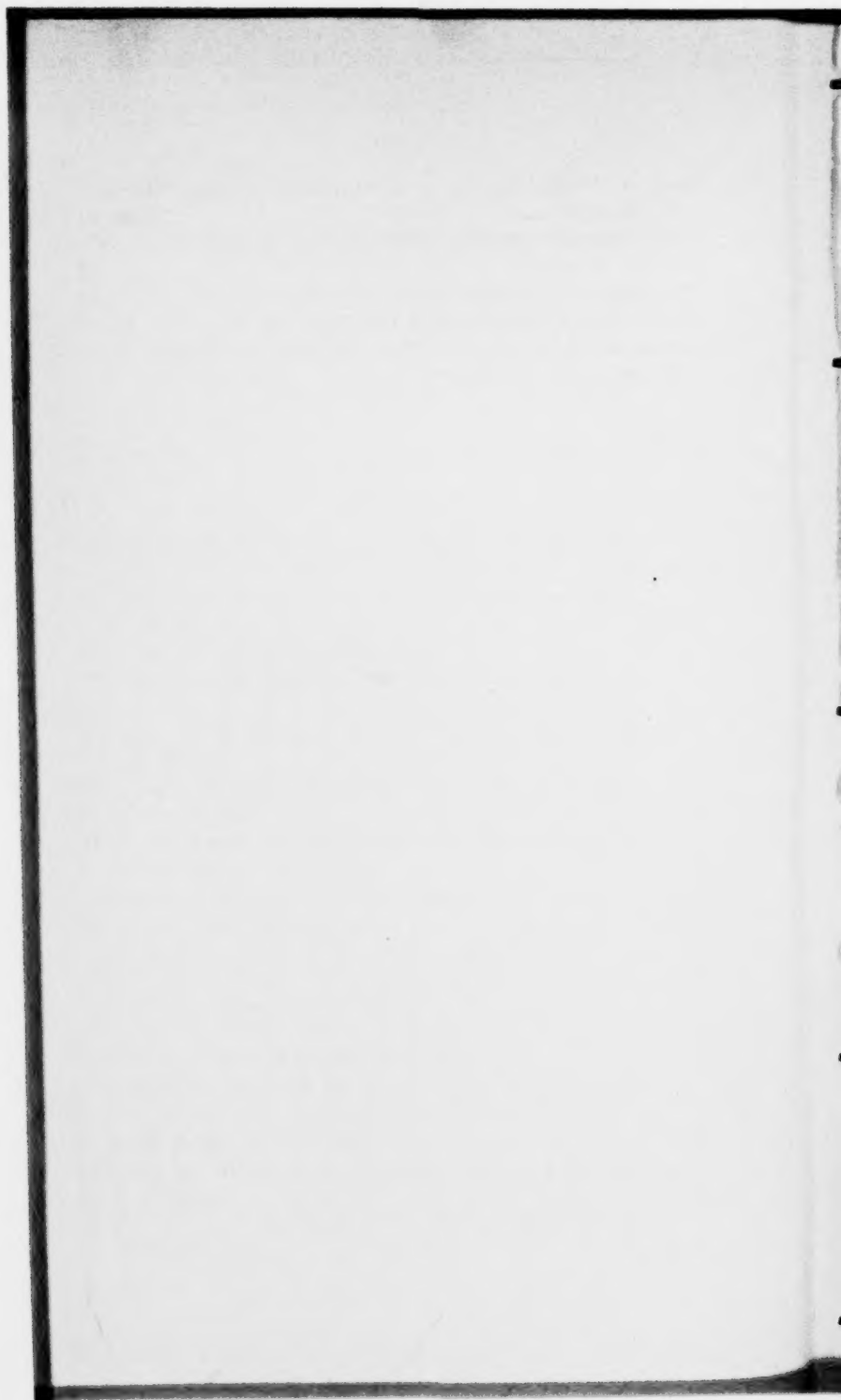
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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 133.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD
COMPANY, APPELLANT,

v.

THE UNITED STATES.

No. 232.

KANSAS CITY, MEXICO AND ORIENT RAILWAY
COMPANY OF TEXAS, APPELLANT,

v.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

INTRODUCTION.

This is the second appearance in this court of what have come to be known as the "Divisor Cases." They are representative of claims for additional compensation for carrying the mails, made by about 800 railroads and involving an amount said to approximate \$35,000,000. The questions here presented

first came before this court in *Chicago & Alton Railroad v. United States* and *Yazoo & Mississippi Valley Railroad v. United States*. 242 U. S. 621.

Those cases were twice argued and the judgments of the Court of Claims in favor of the United States were affirmed, without opinion, by an equally divided court. Other cases of the same character were then pressed for decision in the Court of Claims. That court considered again the questions involved and reviewed its action. In explaining its reasons for so doing (R. 55),¹ it said:

It was therefore decided to hear the parties again in argument and certain typical cases have been prepared with the view of presenting all of the questions that it is supposed can arise in these so-called divisor cases. The plaintiffs' attorneys have accordingly been heard in extended oral argument and they have filed able and extensive briefs. They have probably left nothing unsaid that would tend either to elucidate the questions involved or to show the rights of plaintiffs to recover. As we adhere to the conclusion that the petitions should be dismissed, we will deal more at length with the cases than would be done by the mere announcement of a conclusion of law. There are some differences in the cases, but we think they can all be disposed of in one opinion.

The typical cases referred to by the court are these cases and the two others which have been

¹ Except as otherwise specially noted, references will be to the record in the *New York Central Case*, No. 133.

ordered to be argued here at this time.¹ The Government has incorporated in this brief its discussion *in extenso* of the principal questions of law which the four cases present. Because the other cases are those of land-grant roads it has filed in them separate briefs, dealing with this subject and with some additional matters arising therein common also to all the cases.

The Court of Claims dismissed the petitions. The opinion of the court, by the Chief Justice, is an exhaustive discussion of the subject. The associate judges of the court severally filed concurring opinions. The claimants appealed.

The cases raise a very important phase of the long and many-sided controversy between the carriers and the Post Office Department over compensation for carrying the mails. The act of July 28, 1916 (39 Stat. 412, 419), which imposes upon the railroads a definite obligation to carry the mails and provides machinery for determining just compensation therefor, will at least give these matters a wholly new form for the future. While this act has no direct bearing upon the present suit except to throw light reflexly on the previous state of the law, it does have the effect that the court is not now asked to lay down a rule for the future, but only to decide the existing dispute.

¹ *Northern Pacific R. R. v. United States*, No. 109; *Seaboard Air Line Ry. v. United States*, No. 132.

THE FACTS.**No. 133. New York Central & Hudson River R. R. Co.**

The arrangements under which this claimant had been transporting the mail upon certain of the routes served by it expired on June 30, 1909. On August 17, 1908, the Post Office Department informed the claimant of its intention to conduct the usual quadrennial weighing of the mails carried upon these routes "for the purpose of obtaining data upon which the department may adjust the pay for mail service on the route (in accordance with the several acts of Congress governing the same) from July 1, 1909." The notice also cited and quoted the Postmaster General's order No. 412, commonly known as the divisor order, as to the divisor to be used in ascertaining weights.

These statutes were the act of March 3, 1873 (Rev. Stat., sec. 4002), as amended or affected by the acts of March 3, 1875 (18 Stat. 341); July 12, 1878 (19 Stat. 79); June 17, 1878 (20 Stat. 142); March 3, 1905 (33 Stat. 1088), and March 2, 1907 (34 Stat. 1212).¹

The act of 1873 made an appropriation for the increase of compensation for the transportation of mail on railroad routes "upon the conditions and at the rates hereinafter mentioned";

¹ Certain other statutes thought to throw light upon the meaning and effect of these statutes are noted *infra*. Those here referred to constitute, however, the legislation which is controlling in these cases.

Provided, That the Postmaster General be, and he is hereby, authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned, to wit, that the mails shall be conveyed with due frequency and speed; that sufficient and suitable room, fixtures, and furniture in a car or apartment properly lighted and warmed shall be provided for route agents to accompany and distribute the mail and that the pay per mile per annum shall not exceed the following rates. On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars [etc.], the average weight to be ascertained in every case by the actual weighing of the mails for such a number of successive working days not less than thirty at such times after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct . . . [Italics ours.]

The act of 1875 added a direction that the Postmaster General should have the weighing done by the employees of the Post Office Department and the weights "should be stated and verified to him by said employees under such instructions as he may consider just to the Post Office Department and to the railroad companies."

The acts of 1876 and 1878 affected the situation only by requiring reductions in certain percentages from the rates theretofore allowed. Claimants base

a contention upon the wording employed in these statutes. This will be examined in due course.

The only change in the statutory situation made by the act of 1905 was to substitute ninety for thirty in stating the minimum weighing period. The proviso making this change reads:

Provided, That hereafter before making the readjustment of pay for transportation of mails on railroad routes, the average weight shall be ascertained by the actual weighing of the mails for such a number of successive working days, not less than ninety, at such times after June thirtieth, nineteen hundred and five, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct.

The act of 1907 required a further reduction in rates per mile per annum upon routes carrying an average daily weight of upward of 5,000 pounds. It made no change with respect to roads carrying smaller average weights of mail per day.

On June 7, 1907, Order No. 412, which was a modification of Order No. 165 made in March, was made. It reads:

Order No. 412.—Ordered that Order 165, dated March 2, 1907, be, and the same is hereby, amended to read as follows:

That when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day.

Under these statutes, then, the Post Office Department, as has been said, announced to the claimant its intention to conduct the customary quadrennial weighing of the mails carried by it for the expressed purpose of obtaining data upon which the department might adjust the payments to be made to it. He sent to it, as was also customary, a "distance circular," so-called, to be filled out and returned for the purpose of giving certain information not here material. The circular contained what is sometimes called an acceptance clause, which read:

The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad mail service.

The claimant filled out and returned the distance circular. It did not fill out or sign the acceptance clause, but appended a form of acceptance, dated November 24, 1908, reading as follows:

The company named below agrees to accept and perform mail service upon the conditions prescribed by law and existing regulations of the department applicable to railroad mail service excepting order No. 412, issued by the Postmaster General June 7, 1907. This company can not accept as full compensation for services rendered the amount fixed according to the method of computation of average weight prescribed by said order, and reserves the right to insist on payment according to the method of computing the average weight

applied by the department prior to the issuance of order No. 165, issued by the Postmaster General March 2, 1907. (Finding XII, R. 29.)

The reply of the department, dated January 5, 1909 (R. 29), noted the objection to Order 412 and replied specifically to such objection as follows:

In regard to this, I have to advise you that the department will not enter into contract with any railroad company by which it may be excepted from the operation or effect of any postal law or regulation, and it must be understood that, in the performance of service, from the beginning of the contract term above named and during the continuance of such performance of service, your company will be subject, as in the past, to all the postal laws and regulations which are now or may become applicable during the term of this service.

The claimant made no reply to this letter. (R. 30.)

The Postmaster General then caused the mail to be weighed, and on July 1, 1909, notified the claimant that compensation upon the routes upon which service was to be rendered by this claimant had been fixed by him at certain aggregate amounts. An order was made directing payment to the claimant in those specified amounts. (Finding XII, R. 30.)

The claimant carried the mail upon the routes in question and was tendered and accepted without protest payment of the sums named in the communication of July 1, 1909. (Finding XIV, R. 33; Finding XVI, R. 34.)

The petition herein was filed April 6, 1914, and claims for services rendered between July 1, 1909, and July 1, 1913. A total recovery exceeding \$1,250,000 is asked.

No. 232, Kansas City, Mexico and Orient Railway Company.

Claimant, the Kansas City, Mexico and Orient Railway Company, is a corporation organized and existing under the laws of the State of Texas, and operates, and for a long time has operated, in the States of Oklahoma and Texas, a railroad over which it has transported the mails of the United States, more than six round trips per week, under quadrennial agreements with the Postmaster General, between Altus, Okla., and San Angelo, Tex., a route authorized by the Postmaster General and designated as No. 150106.

In the construction of the above line of railroad plaintiff was not aided by any grant of lands or other property made thereto by the United States.

The plaintiff entered into two contracts with the Postmaster General, which were identical, one of them taking effect on the 1st day of July, 1910, and the other on the 1st day of July, 1914.

The arrangement under which the above railway had been transporting the mail on the route served by it was to expire on June 30, 1910. On February 4, 1910, the Postmaster General wrote to the claimant stating his intention to conduct the usual quadrennial weighing of the mails carried upon this route "for the purpose of obtaining data upon which the

department may adjust the pay for mail service on the route (in accordance with the several acts of Congress governing the same) from July 1, 1910." (Rec. 232, Finding XIII.) (For a minute of the acts of Congress and extracts therefrom, *supra*, pp. 4-6.)

In said letter the Postmaster General also called to the attention of claimant that the weighings would be made according to Order No. 412, which he quoted. (For a copy thereof, see *supra* p. 6.) The Postmaster General sent to it, as was also customary, a "distance circular," so-called, to be filled out and returned for the purpose of giving certain information not here material. The circular contained what is sometimes called an agreement (or acceptance) clause, which read:

The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department, applicable to railroad mail service.

On March 30, 1910, the claimant returned the distance circular above referred to duly signed.

The Postmaster General caused the average daily weight of mail carried by the claimant to be calculated as provided in Order No. 412 and on the basis of the weight thus found he stated the compensation for carrying the mails upon the route served by the claimant. The claimant thereafter carried the mail over this route and received compensation as stated.

On March 9, 1912, the United States District Court appointed receivers for the claimant company and they retained possession of the property of the claimant until July 8, 1914, when they were discharged. (Rec. 232, Finding XI.)

In February, 1914, a distance circular was sent to the receivers of the claimant for the purpose of readjusting pay for the new term beginning July 1, 1914. The distance circular was returned duly signed and with it was sent a letter reading as follows:

DEAR SIR: The inclosed railroad distance circulars bearing date of February 9, 1914, referred to in your letter February 9, 1914, are filed without waiver of rights, consent, or acknowledgment that the manner and method of weighing mail as now determined by Postmaster General's Order No. 412 is a legal method for determining the pay or compensation to the receivers for the handling and the carrying of mail, nor by the filing of said railroad distance circulars do the receivers waive or discharge any rights or remedies sought to be established or enforced by any legal proceedings now pending.

The reply of the department, dated April 8, 1914, noted the objection to Order 412 as follows:

"With regard to this, I have to inform you that, notwithstanding the same, the Post Office Department will not enter into contract with any railroad company by which it may be excepted from the operation or effect of any postal law, regulation, or order of the Postmaster General; and it must be understood that in the performance of service from the

beginning of the contract term above named and during the continuance of such performance of service, your company will be subject, as in the past, to all the postal laws, regulations, and orders of the Postmaster General which are now or may become applicable during the term of this service; and that no other or further compensation for such service performed will be paid than that fixed by the orders of the Postmaster General.

With special reference to the order of the Postmaster General of June 7, 1907, No. 412, your attention is called to my letter of June 30, 1913, respecting its application and to the fact that the amount of compensation for the transportation of the mails which will be fixed after making such application is all the compensation that will be paid for such service on the routes named. (Finding XI, R. 20.)

No reply appears to have been made by the claimant to this letter.

An order dated August 22, 1914, stated the sum which the claimant would be paid for carrying the United States mail over its route. The claimant continued to carry the mails as offered to it and it received without protest payments as stated in said order.

It affirmatively appears that plaintiff after objection made was informed that the sum which it would receive was such sum as was reached by applying the weights reached by the method prescribed in Order No. 412 to the rates of payment fixed by the Postmaster General in accordance with the statutes.

The petition herein was filed October 11, 1911. It was amended January 21, 1918, to include what was claimed on account of services between 1911 and October 31, 1916. A total recovery of \$11,888.77 is asked.

THE CONTENTIONS OF THE PARTIES.

The principal contention of all of the claimants in these divisor cases rests upon the assertion that Order No. 412 was invalid. That order, as above stated, directed that in computing the average weight per day of mail carried over any given route, the total of the weights obtained by weighing upon every day upon which mail was carried during the designated weighing period should be divided by the whole number of days included in that period. This was a departure from the previous practice in which what was treated as the average daily weight was obtained by dividing the total amount of weight carried during the weighing period by the number of days other than Sundays in the period. Mail carried on Sundays had, however, been weighed on those days and included in the dividend.

The appellants contend that the earlier practice of the department was in obedience to the law and that any departure therefrom was forbidden by the law. The law referred to is the statutes of 1873 and 1905, previously set out, and it is upon those statutes, as they construe them, that appellants rely.

The suits are to recover the difference between the amount actually offered and paid by the Post Office Department to the carriers for the services

rendered and an amount obtained by applying the maximum rates permitted by the statute to a so-called "average weight" computed under the rule for which the carriers contend.

All the various claimants rely upon the premise that Order No. 412 was invalid, but they proceed to the conclusion that they are entitled to the recovery claimed by somewhat different paths. Since, however, each must face the facts that the Postmaster General named a specific amount as that which he would pay for the service proposed and that without subsequent protest they performed the service and accepted the payments tendered, all seek to avoid the effect of these circumstances by contending that, despite these facts, the Postmaster General was bound to pay the amounts which they claimed because, they say, Congress had fixed their compensation at the amount claimed by the acts of 1873 and 1905. They say those statutes require the application of the maximum rates fixed to average weights calculated by the use of the divisor used before 1907. Since such a contention depends primarily upon the meaning of those statutes, they seek to support it by argument based upon alleged contemporaneous departmental construction and by inferences drawn from the language and legislative history of certain statutes, said to be *in pari materia*.

To this the Government replies that the making of such contracts for the carriage of mail and the terms thereof have always been left by Congress, within certain maxima, to the discretion of the Postmaster

General; that in these cases the appellants voluntarily entered into contracts with the United States, under which they have been paid all that was promised; that it is not material to any question here presented whether, in making his offer, the Postmaster General followed strictly the directions of Congress; but that in fact he did comply with every restriction upon his discretion.

It denies that anything in the statutes relied upon, in departmental action under them, or in the subsequent action of Congress, leads to the conclusion that Congress has in any respect fixed a divisor which the Postmaster General must use in arriving at the basis for the classification which is to determine the limits of the application of maximum rates prescribed; and it says that Order No. 412 was not only a valid exercise of the Postmaster General's discretion, but was wise and just both to the carriers and to the United States.

It also insists that if the statute had fixed the amount the Postmaster General should pay for services, the mails to be carried with due frequency and speed, while the Postmaster General could not bind the United States to pay more than such rate, a contract accepted by plaintiffs for a *less* rate would bind them and they could not recover after acceptance, even if they might have coerced a contract at a higher rate.

The issues are thus made up.

ARGUMENT.**I.**

CONGRESS HAS NEVER FIXED THE COMPENSATION TO BE PAID FOR TRANSPORTING THE MAILS, BUT UNTIL THE PASSAGE OF THE ACT OF 1916 REPOSED IN THE POSTMASTER GENERAL FULL DISCRETION, WITHIN CERTAIN MAXIMA, TO NEGOTIATE SUCH CONTRACTS AS SEEMED TO HIM JUST AND REASONABLE.

A. THIS IS SHOWN BY THE LANGUAGE OF THE STATUTES.

1. LEGISLATION BEFORE 1873.

From the very beginning, Congress made it the duty of the Postmaster General to arrange by contract for the carriage of the mails and to that end consistently reposed in him the very widest discretion. It has made very few restrictions upon his exercise of that discretion, and those only in plain and unmistakable terms. It was long ago observed by Mr. Justice McLean, speaking for this Court in *United States v. Macdaniel*, 7 Pet. 1, 13, that

A practical knowledge of the action of any one of the great departments of the government must convince every person that the head of a department in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government would evince a most

unpardonable ignorance on the subject. Whilst the great outlines of the movements may be marked out, and limitations imposed upon the exercise of its powers, there are numberless things which must be done that can neither be anticipated nor defined, and which are essential to the proper action of the government.

These considerations are especially applicable to the Post Office Department, whose duties are primarily administrative rather than executive. The Post Office is only a very great business enterprise whose special character and importance make it desirable that it be conducted by the Government and not by private enterprise. Its successful conduct very obviously requires that its manager have power and discretion comparable with those which are customarily given to those who direct great private operations. Such limitations as Congress has from time to time imposed upon the Postmaster General have, therefore, been few in number and general in character and have been directed solely to the protection of the Government from the results of imprudence upon his part, or extortion on that of those with whom he must deal. It is to be expected that the Congress should leave those contracting with the Government to look after their own interests. A review of the statutes shows that such are the facts.

The first was the act of September 22, 1789 (1 Stat. c. 16). It authorized the temporary establishment of the Post Office, provided that the regulations should be the same as they had been under "the

resolutions and ordinances of the late Congress," [of the Confederation] and subjected the Postmaster General "to the direction of the President of the United States in performing the duties of his office and in forming contracts for the transportation of the mail." The "resolutions and ordinances of the late Congress" had limited the discretion of the Postmaster General only by requiring that he should make no contracts for service on new routes which should occasion expense to the General Post Office (resolutions of February 15, 1787, 12 Journals, Continental Congress, 10), and that in making general contracts for one year by stage carriages or horses, "as he shall judge most expedient and beneficial," preference should be given "to the transportation by stages, to encourage that useful institution when it can be done without material injury to the public." (Resolution, July 3, 1788, 13 Journals, 42.)

In 1792 (Act of February 20, 1792, 1 Stat. 232, c. 7), Congress dealt with the subject in detail and emphasized its intention to repose a very wide discretion in the Postmaster General. It empowered him to provide for carrying the mail of the United States, by stage carriages or horses, as he may judge most expedient; and as often as he, having regard to the productiveness thereof, as well as other circumstances, shall think proper, and defray the expense thereof. . . .

His power was limited only by a provision requiring contracts to be let only after advertisement (sec. 6), and by a provision that such contracts as he should

make for extending the line of posts beyond those authorized by the act should not exceed eight years nor be made "to the diminution of the revenue of the General Post Office."

The act of May 8, 1794 (1 Stat. 354, 358), reduced the maximum term for which contracts might be made to four years. Otherwise the powers conferred by the act of 1792 were continued from time to time in substantially the same language by subsequent statutes.

By 1813 a new means of transportation had come into use and the act of February 27 of that year (2 Stat. 805) recognized the fact by authorizing the Postmaster General "to contract for carrying mails of the United States in any steamboat" which might ply between post towns. A limitation was annexed which is the prototype of subsequent legislation and marks the purpose of Congress to fix certain maxima and then leave the matter to the discretion of the Postmaster General. It was provided that no such contract should be made for more than four years, nor at a greater rate of pay, "taking into consideration distance, expedition and frequency," than was paid for service by stage on the adjacent roads. Two years later (act of February 27, 1815, 3 Stat. 220) the maximum was stated in terms of money. The Postmaster General was authorized to have the mail carried "on such terms and conditions as shall be considered expedient," but not more than three cents for each letter or one-half cent for each newspaper was to be paid.

In 1838 the railroads had entered the situation. In authorizing the transportation of mail upon them, and making them "post roads," Congress followed the policy now well established of conferring upon the Postmaster General broad authority to contract at his discretion, but of imposing maximum limits upon the amount which he should agree to pay. By the act of July 7, 1838 (5 Stat. 271, 283), the Postmaster General was directed to cause the mails to be transported upon the railroads "provided he can have it done on reasonable terms and not paying therefor in any instance more than twenty-five percentum above what similar transportation would cost in post coaches." In the following year (act of January 25, 1839; 5 Stat. 271), this maximum was also made more definite by stating it in terms of money. The Postmaster General was forbidden to allow more \$300 per mile per annum.

So from the very beginning of the carriage of mail by the railroads, the Congress neither attempted to compel the rendering of service nor perform the functions of the Postmaster General and to determine what rate he should offer therefor. It contented itself with prescribing a limit which he should not exceed and, within that limitation, left him to contract as best he could.

By the joint resolution of February 20, 1845, it emphasized still further that purpose by removing the requirement of advertising for bids, a requirement obviously ill suited to the practical necessities of the situation.

The important act of March 3, 1845 (5 Stat. 732, 738, c. 43), reflects the same policy. Section 19 of that statute is that which is here important. By that section it was made the duty of the Postmaster General, in order "to insure, *as far as may be practicable*, an equal and just rate of compensation according to the service performed," to divide the railroads into three classes according to the size of the mails carried and the speed and importance of the service. He was forbidden to pay *more* than certain amounts of compensation.

But even this limitation was not rigid. Where he deemed especially frequent service necessary, he was authorized to exceed the maximum compensation fixed by such amount

as he may think just and reasonable, having reference to the service performed and the maximum rate of allowance established by this act.

It is especially significant that the Postmaster General was specifically authorized to resort to means of transportation other than the railroads

in case (he) shall not be able to conclude a contract for carrying the mail on any such railroad routes, at a compensation *not exceeding the aforesaid maximum rates, or for what he may deem a reasonable and fair compensation.*

Argument as to the extent of discretion reposed in the Postmaster General is unnecessary in view of the language of this statute. He was to classify according to a prescribed general division. But the precise

indices which would determine the placing of a railroad in one class or another, to be created, were left wholly to his discretion. He was to pay "an equal and just rate of compensation," "as far as may be practicable." But only he was to judge what was equal and just, or what was practicable. He was to make contracts if he could do so on terms which he deemed to be "*a reasonable and fair compensation.*" Should he not succeed, he was given authority to turn to such other means of transportation as should offer. And such authority remained a part of the law after the acts of 1873, 1876, 1878, and 1907, upon which appellant relies. It was reenacted as section 212 of the act of June 8, 1872, revising and codifying the laws relating to the Postal Service, and became section 3999 of the Revised Statutes. The acts cited by appellant must be read in the light of it.

Between 1845 and 1873 there was a great development of the business of carrying the mails coincident with the great expansion of the railroads themselves, the increase in population, and the settlement of the West. The weight of the mails was multiplied, separate mail cars were introduced, the railway post office was developed, and other far-reaching changes occurred.

But the law remained unchanged. In the revision and consolidation of the statutes relating to the Post Office Department in 1872 (17 Stat. 283, 309, c. 335), the principal provisions of the act of 1845 were reenacted.

It is beyond argument that from the formation of the Government the rendering of service in carrying the mails, as well as the rates at which the service should be performed, was left by Congress to be settled by contract. In negotiating such contracts, there were but two limitations upon the discretion of the Postmaster General other than the obligation of his oath of office. These were the requirement that contracts should not be made to run more than four years, and that, except under certain specified conditions, the Postmaster General should not agree to pay compensation at rates exceeding certain maxima. The policy of leaving it to the Postmaster General, within those maxima, to obtain the best terms he thought possible appears consistently and continuously. There was not even a suggestion by Congress of an intention itself to fix the rates. It is in the light of this history and of the policy thereby shown firmly to have been established that the act of 1873 and the subsequent acts upon which the appellants rely must be read.

2. THE ACT OF 1873.

As has been just shown, the Postmaster General, under the act of 1845, was directed to classify the railroads of the country into three classes according to the size of the mails carried and the frequency and importance of the service. For the three classes thus resulting, differing maximum rates of compensation were provided. But the method of

the classification, the number and relation of the factors to be used, the indices of frequency and importance, the method of determining relative size—the factor capable of most accurate determination—were all left to his untrammelled judgment.

The act of March 3, 1873, undoubtedly introduced an important change, so far as the statutory situation went, in that it gave certain general directions regarding the method which the Postmaster General was to employ in determining the bases to which to apply his discretion in making mail contracts. But it did not change the policy of Congress to leave these matters largely to the discretion of the Postmaster General, and it did not even purport to fix rates other than, as before, to establish certain maxima.

It was, of course, followed by the amending act of March 3, 1905, which extended the weighing period from at least 30 to at least 90 days, but made no other change.

The act of 1873 begins by directing the Postmaster General to readjust compensation "upon the conditions and at the rates hereinafter mentioned," a circumstance not to be forgotten in weighing the contention of the appellants that in using similar language in the acts of 1876 and 1878, Congress intended absolutely to fix the rates of compensation and to remove the matter from the discretion of the Postmaster General. It proceeds with language which

removes any uncertainty as to its intentions. The conditions are that the mails shall be conveyed with "due" frequency and speed and that "sufficient and suitable" accommodations shall be provided. Whether in any given case these requirements are met is, of course, left to the judgment of the Postmaster General.

The statute then continued:

And that the pay per mile per annum shall not exceed the following rates, namely: (1) on routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars * * * [etc.]

The maxima here imposed were graded, and it is required that this application shall be upon the basis of the average weight per day carried. In this respect there is a change from the requirements of the previous statute, but the change is merely one of degree, and the grading was for the sole purpose of determining the application of the maxima stated. The average weight which is to be the basis of this application is to be determined by actual weighing for not less than a certain number of days, done not less frequently than once in four years. But no more is said. In dealing with the weighing period, Congress followed again its policy of leaving such matters to the Postmaster General's judgment within very broad limits. How often the mails shall be weighed, for exactly how many successive days, at what time of the year, under what conditions—all these things are left to the untrammelled discretion of the Post-

master General, who is to determine whether the conditions of "due frequency and speed" and of furnishing of "suitable" room and the like have been complied with. No mention is made of any divisor, nor is there any attempt to prescribe any of the details of calculation. The intention of Congress to leave all these things to the Postmaster General's discretion was further shown by the supplementary act of March 3, 1875, in which the discretion of the Postmaster General was again recognized by authorizing him to "have the weights stated and verified to him under such instructions as he may consider just to the Post Office Department and to the railroad companies."

The degree of discretion given the Postmaster General under the act of 1873 will be further examined in another connection. It is plain, however, that, as before, Congress left to the Postmaster General authority to make such contracts, within the stated maxima, as he was able to make and to the railroads the option of agreeing to the terms which he should propose, or of refusing them and declining to perform the service desired unless better terms were offered. It said nothing which supports the contention that it fixed definite rates of pay for any given service.

3. SUBSEQUENT LEGISLATION.

It is claimed, however, that, though it may be difficult, if not impossible, in the face of the express language used, to establish that the act of 1873

was a definite fixing of compensation by Congress, such a result followed from the language employed in the acts of July 12, 1876; June 17, 1878; and March 2, 1907.

This contention is unsupported either by reason or authority.

The act of July 12, 1876 (19 Stat. 78, 79), directed that the Postmaster General should readjust compensation by reducing it "ten per centum per annum from the rates fixed and allowed by the first section of an act entitled (here follows title), approved March third, eighteen hundred and seventy-three." The act of June 17, 1878 (20 Stat. 140, 142), ordered a further reduction of "five per centum per annum from the rates for the transportation of mails, on the basis of the average weight fixed and allowed by the first section of an act entitled," (reciting said act of March 3rd, 1873). The act of March 2, 1907, ordered a reduction on routes carrying upwards of five thousand pounds of mail daily "by making the following changes in the present rates per mile per annum . . . and hereafter the rates on such routes shall be as follows . . . five per centum less than the present rates."

These statutes are all amendatory of the act of 1873. It has already been noticed that that statute directed readjustment "at the rates hereinafter mentioned." But the rates thereafter mentioned are, by their express terms, maxima only. Expanded the phrase means "at the rates hereinafter mentioned,

namely, the best rates which the Postmaster General can obtain but not exceeding these amounts to wit," etc. Reading the subsequent statutes with the act of 1873, it is perfectly plain that what was intended was a reduction of the maxima fixed by the act of 1873 and no more. This is especially true of the act of 1907 whose language read alone is that best calculated to give plausibility to appellant's argument. The act of 1907 affects only the heaviest and most attractive routes. It is hardly consistent with reason to say that Congress intended to leave the Postmaster General free to make the best terms he could as to the routes least attractive to the carriers, but to divest him of his discretion as to those which offered the most likely opportunity of making a good bargain.

It must not be forgotten that another statute *in pari materia* has remained upon the books throughout the period under discussion. It is R. S. 3999. It reads:

If the Postmaster General is unable to contract for carrying the mail on any railway route at a compensation not exceeding the maximum rates herein provided *or for what he may deem a reasonable and fair compensation* he may contract [with other means of conveyance].

The authority here given is, of course, wholly inconsistent with the notion that Congress had definitely fixed rates and removed the matter from the discretion of the Postmaster General. It is

wholly consistent with the view that Congress had throughout contented itself with fixing maxima which the Postmaster General might not exceed, but expected him, within those limits, to pay only what he deemed *fair and reasonable*.

B. IT IS SHOWN BY THE DECISIONS.

What is thus clear as an original matter is settled by authority.

The contention that in the acts of 1873, 1876, and 1878, Congress fixed absolutely the rates to be paid for carrying the mails, instead of merely setting maximum limits within which the Postmaster General should exercise his discretion, is not new. In *Eastern R. R. Co. v. United States*, 20 Ct. Cls. 23, it was held that this contention was unsound. On appeal to this court that decision was affirmed. This court said, 129 U. S. 391, 395:

After the first of July, 1877, the company was under no legal obligation to carry the mails. It carried them after that date under an implied contract that it should receive such compensation as was reasonable, not exceeding the maximum rates prescribed by Congress and subject to a readjustment of rates as required by the act of 1876.

That decision made in 1885, and growing out of reductions made in pursuance of the acts of 1876 and 1878, has since been repeatedly followed by the Court of Claims (*Minn. & St. Louis Ry. Co. v. United States* (1889), 24 Ct. Cls. 350; *Texas & Pacific Ry. Co. v. United States* (1893), 28 Ct. Cls. 379, 389).

In the second of these cases, the Court of Claims said (389):

It seems to have been assumed by the claimant that the statutes fix an absolute rate of compensation while in point of fact they fix only the maximum below which the Postmaster General is authorized to make such contracts as he deems the needs of the mail service may justify.

No appeal appears to have been taken from the decisions last mentioned. To the like effect is the case of *Atchison, Topeka & Santa Fe Ry. v. United States* (1911), 225 U. S. 640, 649.

In that case this court said (649):

The statute defined a car line, but did not fix the compensation. It left that to be determined by the Postmaster General, who could have named any rate, not to exceed the statutory maximum.

It may be fairly assumed that these decisions have been known to Congress, which in turn must be assumed to have been content with the situation, since it did not take the easy way open to it of changing the situation by a clear expression of its intention itself to fix the rates.

C. IT IS SHOWN BY THE PRACTICE OF THE POST OFFICE DEPARTMENT.

If it were a fact that the Postmaster General had in every case been willing to pay to the railroad companies the full rates permitted him by the statutes, it would be entirely consistent with the proposition

that Congress had fixed only maximum and not absolute rates. It would only reflect the judgment of the Postmaster General that under all the circumstances the price so paid was fair and reasonable and was the best at which he could obtain contracts for the service which he desired during that period.

It appears, however, that while the Postmaster General has, as a rule, been willing to offer the maximum permitted to him, the rule has by no means been without exception. Numerous instances of departure from the maxima appear in the reports of the Post Office Department.

Such departures are to be found in the numerous cases of "agreement routes" where the pay is fixed without weighing at the lowest rate named in the law, a rate frequently less than the weights actually carried would justify; "lap service" routes where pay is adjusted upon a reduced sliding scale (see Postal Laws and Regulations, 1913, sec. 1325; *Texas & Pacific Ry. Co. v. United States*, 28 Ct. Cls. 379); "blue tag" routes which provide for the transportation of certain kinds of mail matters in fast freight trains at rates less than the maxima named in the statutes, and "equalization" rates fixed on a basis of comparison with competing lines.

The *pro rata* allowance for weights intermediate between the limits of classification named in the statute is another instance of the same sort of discretionary action.

A striking example of the exercise by the Postmaster General of his power to offer compensation less than the maximum permitted by the statutes received the attention of this court very recently.

In *Atchison, Topeka & Santa Fe R. R. v. United States*, 249 U. S. 451, decided April 14, 1919, the statute involved (act of March 4, 1913), authorized the Postmaster General to add to the compensation for carrying the mails "not exceeding five percentum per annum." It was earnestly contended, in the light of what was there, as here, said to have been the uniform practice of the Post Office Department and of the legislative history of the matter, well known to Congress, that this statute required the Postmaster General to add a flat five percentum and that his action in giving distinctly smaller increases was in violation of law. This court held that the statute conferred upon the Postmaster General a discretion, which he had not been shown to have abused, and reversed the judgment of the Court of Claims to the contrary.

It may be added that Congress has understood fully that in so far as the Postmaster General has seen fit to offer the maximum rates permitted, it was not in obedience to the mandate of the law, but an exercise of discretion. In a report by the House Committee on Post Offices, made February 8, 1916 (Cong. Rec. 64th Cong., 1st sess., vol. 53, pt. 3, pp. 2316, 2318), it was said:

In every law enacted by Congress on the subject of railway mail pay, since Congress first legislated 77 years ago in regard to the

carriage of mails on railroads (July 7, 1833), the Postmaster General has been given free and full power to contract with a railroad for the carriage of the mails at any rate within the maximum rates named in the several laws if he should be able to do so.

During the life of the present railway mail pay statute, passed in 1873, no Postmaster General has arbitrarily reduced rates, though under the law he has had full power to do so.

II.

UNTIL THE PASSAGE OF THE ACT OF 1916 CONGRESS HAS NEVER ATTEMPTED TO COMPEL THE RAILROADS TO CARRY THE MAILS, BUT HAS LEFT THEM FREE TO ACCEPT OR TO REJECT THE TERMS OFFERED BY THE POSTMASTER GENERAL.

This is apparent from the statutes which have been reviewed. R. S. 3999 (*supra*, p. 21), conferring upon the Postmaster General power to resort to other means of transportation should he find himself unable to conclude upon reasonable terms a contract with the railroads, is especially significant.

Moreover, instances of refusal of the railroads to conclude contracts upon the terms offered have occurred, and the Postmaster General has frequently, in his annual reports, referred to the situation and its possibilities. Examples are to be found in the report for 1862, pp. 9 and 10; in the report for 1870, p. 11; in the report for 1877, pp. xxxiii and xxxiv; and in the report for 1888, p. xxxi. In these reports and others, the Postmaster General called to the attention of Congress the difficulties which constantly threatened the Department, and more than once

urged that Congress enact legislation which should make the service compulsory. In his report for 1888, the Postmaster General said:

In this connection I call attention to the condition of the law, in urgent need of revision, which reposes no authority in any official of the Government to compel the owner of a railroad to receive and carry the mails of the Republic.

In this state of things the Government is always at a disadvantage in negotiating for improved mail facilities and public opinion and sentiment are the only force to which the department can now appeal to secure them.

Notwithstanding these repeated recommendations, Congress took no steps to make the carriage of mails by non-land-grant roads compulsory until the act of July 28, 1916 (39 Stat. 419). That statute provided that all railway common carriers were required

to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General, and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith. (Comp. Stat., 1918, Sec. 7482a, par. 27.)

The refusal to comply with the requirements of the statute was made an offense and an effective penalty provided.

That the railroads were free to accept the terms offered by the Postmaster General or to refuse them and decline to perform the service requested has been

repeatedly recognized by this court. Such was the ruling of the court in the following cases, among others:

Eastern R. R. Co. v. United States, 129 U. S. 391.

Chicago, M. & St. P. R. R. Co. v. United States, 198 U. S. 385.

Atchison, T. & S. F. R. R. v. United States, 225 U. S. 640.

Delaware, etc. R. R. v. United States, 249 U. S. 385.

In the *Atchison case*, Mr. Justice Lamar said (650):

The railroad, however, was not bound to furnish "half lines" nor to accept the terms named by the Postmaster General. For Congress had not so legislated as to require compulsory service, at adequate compensation to be judicially determined or in a method provided by statute.

In the *Delaware, Lackawanna & Western case*, Mr. Justice Holmes said (388):

The railroad was free, as in the *Eastern Railroad case*, to decline to carry at the new rates, but could not insist upon the old ones after notice that they had been revised.

III.

THE APPELLANT VOLUNTARILY ENTERED A RELATION OF CONTRACT WITH THE UNITED STATES, AND ITS RIGHT TO COMPENSATION FOR THE SERVICE WHICH IT HAS RENDERED IS MEASURED AND LIMITED BY THAT CONTRACT.

The theory upon which the appellant seeks to recover is somewhat elusive. It denies that the circumstances which have been set out as to what the parties said and did constitute an express contract.

It seeks, says the Court of Claims (Opinion, R. 40), to rely "upon implied contract for recovery as upon *quantum meruit*."

As to the very great majority of the routes which are involved in the group of cases now before the court, the facts as to the service actually rendered stand stubbornly in the way of such recovery. This is well illustrated by the figures given by the Court of Claims in its opinion (R. 40). Speaking of what is said to be a typical route, the court says that the mail actually carried on 105 successive days was weighed and the weights totaled. The sum so obtained was divided by 105 and the daily average weight was found to be 143,314 pounds. To this figure, which is mathematically exact, the highest rates permitted by the statute were applied, and payments offered accordingly were accepted without objection or protest. Since, therefore, there has been payment at the highest legal rate for the mails actually carried, and since no conceivable measure of value more favorable to appellant than the highest legal rate is warranted by the record here, the Court of Claims puts (p. 40) the very pertinent question: "Can it [i. e., the appellant] recover under an implied contract as upon *quantum meruit* for [the] nine million pounds of mail which it did not in fact carry?"

The various claimants use differing language in endeavoring to meet this embarrassment, but in one form or another their contentions work out in an assertion that Congress has made them a statutory promise to pay a fixed rate; namely, the maximum

rate set out in the statute when applied to an "average" weight arrived at by using as a divisor the figure for which they contend. It will be noticed that there are two elements necessary to this contention. Appellant must show both that the divisor was fixed and that the rate to be applied after the divisor has been used was fixed absolutely and not as a mere maximum. Should appellant fail as to either factor, his contention here would fail. Whether, in view of the consideration about to be considered, it can stand even if both were established is a question which, while not conceded, need not delay the court. This is true because it has already been demonstrated both on reason and authority that Congress has not fixed any absolute rate of compensation, but has left the railroads and the Postmaster General free to contract. One of the essentials to appellant's case, therefore, fails.

And the parties, being thus free so to do, have entered into a relation of express contract. The contract has been fully performed on both sides. Nothing remains upon which to found a suit.

That the parties have made as to every route involved an express contract is specifically found by the Court of Claims (Opinion, Campbell, C. J., R. 63, 67; Booth, J., concurring, R. 68; Downey, J., concurring, R. 70). That being so, said the court

The plaintiffs transported the mails in accordance with the terms proposed by the Postmaster General and, having been paid the sums respectively due them, it follows that their petitions should be dismissed.

And the court was right.

Taking the New York Central case as typical, and reviewing the events in sequence, the Postmaster General first sent out the customary distance circular. His express purpose was that of "obtaining data upon which the department may adjust the pay for mail service on the route * * * from July 1, 1909." In view of the fact that this circular, which in terms bound the department to nothing and which left to future determination so much that was vital to any effective contract, it would appear to be a mere preliminary to an offer to contract on the part of the Postmaster General. If, however, in view of the previous history of the dealings between the parties and of the other circumstances it could be said to be an offer, it was not accepted. The appellant failed to sign the so-called "acceptance clause" contained in the circular, and its letter only expressed a willingness to abide by the laws and regulations applicable to railroad mail service other than Order 412. Such an offer can not be accepted in part and the rest left to future negotiation. (*Minneapolis etc., Railway v. Columbus Rolling Mill*, 119 U. S. 149, 151; *Compania Bilbaina v. Spanish-American Company*, 146 U. S. 483, 497.) There was a rejection of the offer if one had been made. At the most, the claimant's letter was a counter offer to contract upon certain terms which, while not very precisely defined, involved an abandonment by the Postmaster General of his Order 412. If so, this offer to contract was expressly rejected by the Postmaster General in his letter dated January 5, 1909.

The Postmaster General's letter of January 5, 1909, was, under the decisions above noted, a restatement of the terms including order No. 412, in accordance with which he would contract for the service. Its language was especially directed to claimant's protest concerning Order 412. The terms of the Postmaster General's offer were made definite and final by notice to the claimant of his order of July 1, 1909. In that order, he fixed in precise terms the compensation which he would pay for the service which it was proposed this appellant should render. This was not an offer to compute compensation in any particular way, but to pay specific sums of money for specific services, e. g. for service upon route No. 104025, \$305,253.67 per annum for the four years from July 1, 1909, to June 30, 1913. (Finding XII, R. 30.)

Notice of this order was sent to the claimant. The legal situation then was that the Postmaster General had said to the claimant, "If you carry the mails on route 104025 I will pay you therefor \$305,253.67 a year and for the other routes which you serve the figures contained in my order as to them." It was no doubt still open to the claimant to say, "I will not perform the service," but it did not do so. It did perform without further objection. It was tendered periodically the amount of money which the Postmaster General had said he would pay; it accepted and received the sums tendered it without any further objection. (Finding XVI, R. 34, Opinion Campbell, C. J., R. 67.) The facts as to the Kansas City, Mexico & Orient Ry. Co. are even stronger. (*Supra*, pp. 9-12.) This performance of service

by the appellant and receipt by it of payment in the amount offered it for performance of service was an acceptance of the Postmaster General's offer notwithstanding the appellant's prior verbal protests against its terms. If those protests ever had legal significance, they were waived. (*Compania Bilbania v. Spanish-American Co.*, 146 U. S. 483, 497-498; *Atchison, Topeka & Santa Fe Railway Company v. United States*, 225 U. S. 640, 649.)

In the last case this court, by Mr. Justice Lamar, stated that whatever rule should apply to private parties, public policy requires that the mail should be carried subject to postal regulations, and that the department and not the railroad should, in the absence of a contract, determine what service was needed and under what conditions it should be performed.

In the opinion of the Court of Claims filed in these cases below it said:

The distance circular proposed no terms and the readjustment order did. It was the acceptance and transportation of the mail and the repeated acceptance of the monthly or periodical pay after the Postmaster General had replied to the protests, all without protest or objection, that consummated the contract, the terms of which were evidenced by the notice itself.

Even where protests continued, and the railroads continued to carry the mails under the orders of and terms named by the Postmaster General the protests were of no effect. The terms named by the Postmaster General fixed the rights of the parties.

It must therefore follow that the Postmaster General having stated the terms on which he would contract for service and made the orders authorizing payment based accordingly upon order No. 412 and the statutes fixing maximum rates, and the appellant having carried the mails thereafter, it carried them under an express contract the terms of which were finally fixed by these steps.

The relations of express contract between the railroads and the Government arising under such transactions have been clearly stated in repeated decisions of the Court of Claims.

Minneapolis, etc., Ry. Co. v. United States (24 Ct. Cls. 351, 360).

Delaware, Lackawanna & Western R. R. v. United States (51 Ct. Cls., 426, 433).

Louisville & Nashville R. R. v. United States (53 Ct. Cls., 238).

It is admitted that all of the claimants in these cases have been paid by the Postmaster General the sums which he said he would pay for the services if they were rendered. By rendering those services they agreed to accept those amounts and no more. They have accepted the payments knowing they were tendered as *full compensation*. Nothing remains upon which to found a further recovery. These considerations are decisive of this case. Where the proof shows an express contract however made, there is no foundation for suit or recovery on a basis of *quantum meruit*. (*Hawkins v. United States*, 96 U. S. 689, 698.) The attempt to show a promise by Congress of any fixed and different amount having

failed, there is left only the express and specific promise of the Postmaster General. That promise has been fully performed.

Even if claimants could have coerced more favorable contracts, that does not *make* a contract for them different from those which they accepted. The Postmaster General did not agree to pay *more* than he had authority to pay. The railroads accepted the sum offered and the contract has been fully executed on both sides.

IV.

EVEN HAD CONGRESS DIRECTED THE POSTMASTER GENERAL TO USE ANY PARTICULAR DIVISOR IN CALCULATING THE BASIS TO WHICH TO APPLY HIS DISCRETION, A DEPARTURE THEREFROM WOULD NOT ASSIST THE APPELLANTS.

Assuming for the moment, *arguendo*, that the statute had said in plain terms that the Postmaster General should use a certain divisor in calculating the average daily weight of mail carried, it would still be of no advantage to the appellant.

In the first place, it is necessary to inquire whether such a statutory provision would be mandatory or merely directory. If it were directory only, it ought to be followed, but does not so limit power over the subject matter that it can not be effectually exercised without observing the limitation. (*Hubert v. Lumber Co.*, 191 U. S. 70, 76; *De Visser* case, 10 Fed. 642, 648; *Martins Case*, 94 U. S. 400.) In other words, a deviation from a directory provision may subject the official to responsibility to the Government, but it can not be availed of by third parties. (*Bank v. Dandridge*, 12 Wheat. 64, 81.)

Whether a statute is directory depends upon the result of an examination of its nature, the object, the public convenience affected, and the apparent legislative intention.

Applying these tests, it is clear that the statute, if read to fix any particular divisor, was directory purely; that the directions given were not for the protection of the carrier but for that of the United States, and that Congress, in giving directions, carefully refrained from limiting the Postmaster General in the power which counted—that here exercised—to state within the statutory maximum what price in dollars and cents he would pay for the transportation of the mail over a particular route.

It has already been sufficiently demonstrated that the established policy of the Congress was to impose very few restrictions upon the discretion of the Postmaster General, and that those which it did impose were *maxima and not minima*. They were, therefore, obviously to protect the public treasury against the possible weakness or incompetence of the public official or against the extortion of those dealing with him. These were deemed to need no artificial protection, but were left to look after their own interests, being well able to do so in that they also were left free to refuse to contract at all if not suited with the terms offered. The nature of the restrictions, their apparent object and the balance of public convenience all tend to show that even reading the provision in the extreme manner for which appellant must contend, it remains at most a mere direction of whose

disregard they can not complain after having freely and voluntarily made contracts now fully executed on both sides.

The matter is, however, beyond dispute when it is reflected that the directions, whatever they may be, relate only to a matter preliminary to the making of the contract and the fixing of the rate, and that these effective steps are left, always within maximum limits, to the discretion of the Postmaster General, as has been shown.

To state the matter concretely, let it be supposed that the Postmaster General, after dividing the total weights obtained in 105 successive weighings by 105, as he did, had been convinced that he had not followed the direction of the statute, but that he should have divided by 90. If he deemed the compensation which he was proposing to offer upon the basis of average weight produced by dividing by 105 just and proper, convincing him that the statute required his preliminary calculation to have been made with a different divisor would not change that conclusion. He would simply adjust both sides of the equation, restating on the one side the average weight and reducing pro rata, on the other, the rate to be applied. The result would be exactly the same.

It follows that the entire complaint about the divisor is without point here unless and until appellant convinces this court that Congress fixed absolutely not only the divisor but the rate. Fixing a divisor to be used as a mere preliminary to the exercise of discretion as to rate could not help appellant and could not have been so intended.

The directions given that offers should be stated in certain amounts per mile per annum according to average daily weight and should be applied to a classification based upon actual weighing for a test period were obviously in the interest of efficient administration and for the benefit of the public. They substituted for a rough classification which might be governed only by the whim of the Postmaster General a method of calculation which could be understood and whose application would be open and subject to criticism or to further check if experience should prove them necessary. This was a sufficient reason for the act of 1873. It is unnecessary to read into its words a limitation which is not expressed, or even suggested, upon the traditional discretion of the Postmaster General and which is wholly inconsistent with the manifest continuance of that discretion in the really significant matter of determining the rate to be paid.

But even if there was a mandatory direction to the Postmaster General as to the use of a divisor, the effect would only be to render any use of another, whereby the Government was made to pay a greater sum, an excess of his authority. If he used a divisor, by reason of which the sum was within the amount he had authority to contract for, it would not render the agreement void, and the other party to the contract would have no ground to insist on a greater sum than his contract named.

V.

THE CALCULATION PROVIDED FOR IN ORDER 412 WAS A VALID EXERCISE OF THE DISCRETION WHICH THE LAW GAVE THE POSTMASTER GENERAL.

A. UNDER THE ACT OF 1873, THE POSTMASTER GENERAL HAD DISCRETION AS TO THE METHOD OF COMPUTING AVERAGE DAILY WEIGHT.

It has been shown that Congress has imposed upon the Postmaster General the duty of negotiating for the carriage of mails by contract; that for this purpose it has given him the widest discretion; that restrictions upon that discretion when made have been stated in plain and unmistakable terms. The very character of the Postmaster General's duties required Congress to give him very great latitude of action. It also has been shown, and is of fundamental importance, that Congress left to him, within maximum limits only, the power to determine what rates in dollars and cents he would pay per annum for the carriage of the mails over any given route on the average scale of daily weights and mileage fixed by law as the basis.

The question whether the Postmaster General by the act of 1873 was given discretion as to the manner of ascertaining the average daily weight of mails carried on railroad routes must, therefore, be considered in connection with this general and established policy of postal legislation and in the light of the ends sought by Congress. The thing of primary interest, both to Congress and to each railroad, is, of course, the actual compensation to be paid and not the method of its calculation. Congress directed that the compen-

sation for each railroad route should be controlled by certain graduated maximum rates which were to be applied to whatever may be found to be the average daily weight of mail carried on that route. But, except as limited by these maximum rates per mile per annum, the Postmaster General was given full discretion over the actual compensation. To say that Congress gave the Postmaster General discretion as to this major factor in computing compensation and withheld it as to the minor factor of obtaining average daily weight does not comport with reason.

The exact language of the act of 1873 required the Postmaster General to ascertain "the average weight" of mails carried per day on the various railroad routes. It directed him to ascertain this average by an *actual* weighing of the mails for *at least* thirty successive working days, at least once in every four years. Beyond this it did not prescribe how average daily weight was to be found. The word "average" imports, of course, a divisor and a dividend. One of the factors making up the dividend was fixed, *but as a minimum only*. Nothing is said as to the divisor.

A mathematical average for the daily weight of mail carried on a given route can be found accurately only by dividing the total weight of mail carried on that route during the weighing period by the actual number of days the mails have been weighed. On routes which have daily service—called by appellants "seven-day routes"—if mails were weighed for 35 days, the total weight would be divided by 35. On routes having no Sunday service—called by appellants

"six-day routes"—since weighings would be on only 30 days, the total would be divided by 30. If the act of 1873 can be said to have compelled the Postmaster General to adopt any definite divisor or divisors, and to have deprived him of all discretion in this matter, the divisor fixed by the act must be that in each case which will give the mathematical daily average weight.

The Postmaster General, in computing average weight under the act of 1873, has never adopted divisors yielding absolute mathematical averages. He has weighed the mails on "seven-day routes" for 35 days and on "six-day routes" for 30 days, and in both cases, until 1907, divided the total weight for the weighing period by 30. This practice the claimant accepts as correct and here contends that it is a requirement of law. But the far larger part of the mail is carried on "seven-day routes." Therefore its acceptance and the foundation of the appellants' case involve the assertion that under the act of 1873 the Postmaster General might compute average daily weight by any reasonable choice of divisor, and in the specific instance by one which admittedly does not produce a mathematical average for all routes.

That this is the foundation of appellants' case can not be questioned; and, in view of the general policy of Congress and of the other provisions of the statute which have been noted, is, no doubt, correct. A substantial advance had been made by requiring the use of some definite and comprehensible system based upon ascertained data, and that

was apparently all that Congress desired to do in this respect or thought it wise to attempt, in view of the constantly changing conditions affecting the situation. It certainly intended no more, or it would have said so. The conditions which it did impose upon the Postmaster General's discretion were clearly expressed, and he has steadfastly obeyed them.

B. IF THE ACT OF 1873 REQUIRED A RIGID DIVISOR AND THE POSTMASTER GENERAL HAD NO DISCRETION TO ADOPT AN APPROXIMATE DIVISOR FOR USE ON ALL ROUTES ADAPTED TO CONDITIONS EXISTING AT THE PARTICULAR TIME, THEN THE RAILROADS HAVE BEEN ERRONEOUSLY OVERPAID PRIOR TO THE ADOPTION OF ORDER 412.

The claim of the plaintiff in error rests on the contention that the act of 1873 is mandatory. That under that act the mails are to be weighed not less than 30 working days. That all weights taken during said 30 working day period are to be aggregated, and a divisor of 30 days (covering a 35-day period of the calendar year) is to be applied and the quotient taken as the average daily weight extending through the entire year (or years) until another like weighing and division establishes another average daily weight.

This construction denies the right of the Postmaster General to use any discretion in reaching an average daily weight. For if such discretion be admitted, then the continuance of this system, first so adopted, would rest on discretion. Whenever the Postmaster General felt that changed conditions required a like exercise of discretion he could change.

The statute provides:

The mails must be transported with due frequency and speed. (What is such frequency and speed, the Postmaster General is left to fix when and as often as he deems proper.) Sufficient and suitable room, fixtures, and furniture (in his judgment) in a car or apartment properly warmed and lighted (he adjudging) shall be provided.

The pay "per annum shall not exceed the following rates" for routes carrying their whole length "an average weight of mail per day." (Here follows the maximum annual compensation per mile according to such average daily weights.)

Such weights are to be ascertained in every case by the actual weighing of the mails for such a number of successive working days not less than 30, at such times after June 30, 1873, and not less frequently than once in every four years, as the Postmaster General may direct.

Taking this act as mandatory, where discretion is not expressly stated, its declared objects are:

First. Actual weights are to be ascertained by weighings had for not less than 30 successive working days.

Second. The payment is to be for the service per annum.

Third. An average daily weight, for the 365 days in the year, is the basis for yearly compensation.

In addition to these declared objects, the following omissions are significant:

First. No formula is prescribed for ascertaining such daily average weight.

Second. There is no *command* that weights shall not be taken on days other than working days. There is no definition of "working days."

Third. There is no direction that weights taken on Sundays (if classed as nonworking days) shall be added to the weights taken on the other days of the week.

Fourth. There is no direction that, if so taken, such days shall not be reckoned as "divisor" days if required to get a "true" average daily weight for the 365 days of the year.

The plaintiffs contend—

First. That only secular ("working") days can be taken as a divisor.

Second. That weights taken on every day (7 days per week) shall be included in the weights to be divided.

If this is sound, then the only sound mathematical method to ascertain the average daily weight per annum is the formula given below:

Any other formula must rest on a discretion exercised by the Postmaster General and therefore be subject to change when a change of conditions makes him realize that the grounds on which his judgment was exercised have changed, and hence that the application of the same discretion calls for a change of method.

On the mathematical basis, arising out of the railroads' contention, taking the weights stated in the opinion of the Court of Claims (Rec. pp. 39, 40), we have: The weights for 105 days (90 working days, so-

called) are 15,047,790 pounds. We have in 105 days, out of the 365 days of the year, 90 so-called working days. This would make each 90 working days represent 105 days of the calendar year, and would show that 312 $\frac{2}{3}$ working days were contained in, and represented, the 365 days of the calendar year. Hence on the weights above given the only correct way to get an average daily weight for the 365 days of the year is this:

As 105 : 15,047,790 :: 365 : 52,309,610; *or*

“ 90 : 15,047,790 :: 312 $\frac{2}{3}$: 52,309,610.

The total mail weight for the year is therefore $52,309,610 \div 365 = 143,314$ pounds daily weight.

But if the statute is mandatory that weighings are to be had only on working (secular) days, then they should not be had on Sundays. Assuming that the Sunday weights would average with the other days (which is most likely, as the mails of Sunday originate on preceding days, and mail service on the trains is about as frequent), and deducting one-seventh of the weights taken as Sunday weighings, we have $90 : 12,898,260 :: 365 : 52,309,610$ pounds per annum, or 143,314 daily averages for 365 days.

The only basis, therefore, upon which the railroads have been enjoying in past years a daily average weight derived from adding seven days' weights per week as constituting six working days' weights, has been the exercise of the discretion exercised by the Postmaster General in adapting the general basis to a working basis, established to meet the conditions of service actually existing,

thus varying the mathematical basis necessary for absolute accuracy. This establishes the existence of such discretion.

Every argument used to support and justify the divisor and method used, establishes the existence of such discretion and the right of the Postmaster General to use it in meeting the varying conditions which actual changes in the method of carrying the mails in later years has rendered necessary.

It can not be successfully shown that the method of the Postmaster General, now adopted, does not more accurately ascertain the average daily weight of the mails than did the preceding method which the plaintiffs seek to establish.

If in point of fact the mails are carried seven days in every week, each day is *in fact* a "working" day; but whether so or not, if the seven days' weights in each week are added together and then divided by six days as a divisor, the quotient is not in fact an average one day's weight, but is *in fact* an average one and one-sixth days' weight, whatever name may be given it.

C. THE DISCRETION GIVEN THE POSTMASTER GENERAL BY THE ACT OF 1873 REMAINED IN HIM IN 1907.

1. DEPARTMENTAL PRACTICE HAS NOT AFFECTED IT.

If this matter of the divisor was thus left discretionary by the act of 1873, it remains only to inquire whether anything occurred between 1873 and 1907 to take away that discretion.

Looking first at the practice of the Post Office Department, it appears that from 1873 down to the promulgation of Order 412, in 1907, the Postmaster General continued the system of weighing all mail carried on any route over the same period of time, regardless of whether Sunday service was given, and of dividing the result by a multiple of six. An order issued in 1884, which would have adopted divisors equivalent to the actual number of days mails were weighed, was withdrawn before being put into effect. It is contended by appellant that this departmental practice has in some way destroyed the discretion as to a choice of divisor originally vested in, and exercised by, the Postmaster General.

The significance of the Hatton letter and the reply of the Attorney General (Finding VI, R. 22-24) had been entirely misunderstood as adverse to the selection of a 7-day divisor. Order No. 44 related only to 7-day routes. It did not propose any change of divisor on the 6-day routes. There was no submission of the question as to whether a 7-day divisor for the entire service was in accordance with law. The legality of that order was not submitted. The sole question presented was whether the existing practice with reference to a 6-day divisor was in accordance with, or in violation of, law, such divisor being applied to both classes of routes in accordance with the preceding practice, as opposed to the use of two divisors, a 6-day divisor for 6-day routes and a 7-day divisor for 7-day routes. The answer was in substance that a 6-day divisor was in conformity

with the law and that the use of different divisors at the same time (6-day and 7-day) would defeat the intention of the law. Apparently the reply of the Attorney General was intended to so state the matter, and with this conclusion there is no disagreement on the part of anyone. The opinion gave no reasons for the conclusion, but merely stated it in a few lines.

If the opinion was intended to mean that the existing divisor was mandatory and could not be changed, the opinion of the Acting Attorney General was not sought on this subject; the facts and data relating to this was not presented to him by the Postmaster General.

However, in 1907, the Order No. 412 here involved was submitted by the Postmaster General to the Attorney General for an opinion as to its legality, and in an elaborate opinion the Attorney General held the former opinion not binding and sustained the legality of Order 412 and of the method thereby adopted (26 Op. A. G. 390, 410).

The adoption by the Postmaster General of any divisor other than that giving a mathematical average was, of course, a construction of his power to exercise reasonable discretion in computing average weight. But it was no more. Where acts of third parties are done in reasonable reliance upon a long-continued and uniform practice, rights may exist and estoppel arise which would make a change ineffective as to those in whose favor these factors have operated. But except as to them, it can hardly be

contended that discretion relating to a continuing subject is exhausted merely by using it once.

The choice of a certain divisor over a long period did not, therefore, preclude a later different choice. The claimants here can not assert that the Postmaster General was estopped to change his practice. No attempt was made to affect past transactions or existing obligations. Order No. 412 operated wholly in the future. The services here rendered were rendered with full notice of the Postmaster General's intention. There can be neither waiver nor estoppel.

2. THE SUBSEQUENT ACTION OF CONGRESS HAS NOT AFFECTED THE POSTMASTER GENERAL'S DISCRETION.

Where a statute is open to inconsistent interpretations, no doubt that adopted by those charged with its administration is entitled to great weight, at least where transactions entered upon and carried forward in acceptance of that interpretation are concerned. The difficulty of applying the rule to this case is that it can not be shown that the Postmaster General has ever done anything inconsistent with the continued exercise of that discretion with respect to choosing his divisor, whose commitment to him by the act of 1873, as has been shown, is vital to appellant's case.¹

¹ In determining average weights the Postmaster General has exercised discretion in other ways than in his choice of a divisor. In order to compute the average weight carried on a postal route, the weight at each station on the route is found and multiplied by the distance to the next station and the total of these products divided by the whole length of the route. Prior to 1908 the Postmaster General did not use actual fractions of a mile in making computations. Since 1908 fractions have been

The same difficulty meets an attempt to apply the further rule that the reenactment of a statute which has received such an administrative construction, without change, is an acceptance of that construction and a rejection of those inconsistent therewith. This is the argument which appellants base upon the passage of the act of March 3, 1905, in which the average weighing provisions of the act of 1873, are repeated with no change other than enlarging the minimum weighing period. But the argument begs the question. If the construction, as we insist, was that the Postmaster General had a discretion to use such reasonable divisor as was best under existing circumstances to reach a practical result, then the construction adopted establishes the right to continue to exercise his discretion as circumstances require. A further and final difficulty is that upon examination of the circumstances relied upon it will be seen that the situation which Congress refused to change, although it fully understood its existence, was that of discretion in the Postmaster General to use such divisor as, acting reasonably, he might see fit to choose.

used. Will claimant contend that prior practice had become so embedded in the law that this change was invalid? Yet the statutes are no more silent concerning fractional distances than they are concerning divisors.

Furthermore, the use of any number of days as a divisor is the succeeding step to the one mentioned above, in securing an average: Where the sum of the products have been divided by the total length of the route, the quotient is then divided by the number of days (under Order 412, the total number in the weighing period) and this quotient is taken as the average weight per day. This step is of precisely the same character as the other. It can not be claimed that the Postmaster General was free to exercise discretion in the one case and not in the other.

The act of 1905 changed the minimum of days for weighing the mails, but it left the Postmaster General full discretion to increase both length and frequency of weighing as before.

A like purpose is manifest when one examines the history of the act of March 2, 1907, on which claimants especially rely.

The claimants contend that the proceedings in Congress in connection with the passage of this act show the intention of Congress to give legal permanence to the divisor then being employed. While the bill was being considered in Committee of the Whole House on the State of the Union, an amendment was offered, specifically enacting that the divisor to be used by the Postmaster General should be in every case the actual number of days on which mails were weighed (R. 26). This would have required the Postmaster General to use a 6-day divisor for 6-day routes and a 7-day divisor for 7-day routes. The point of order was made against this on the ground that it changed existing law. The Chair, in sustaining the point, observed that "the limitation on the discretion exercised under the law by a bureau of the Government is a change of existing law." (Cong. Rec. 59th Cong., 2d sess., vol. 41, p. 3471. (The House sustained this ruling. A point of order against a similar amendment was also sustained, and a provision to the same effect, which was in the bill as reported by the Committee on Post Offices and Post Roads, was then stricken out. If then these proceedings in committee have the weight which the

appellants ascribe to them, they show no more than an unwillingness to substitute a mandate for the discretion recognized as existing. The refusal, if any, was to order the Postmaster General to do what was proposed, but there was certainly no order that he continue what he was doing, if in his discretion he should conclude that a change was desirable (R. 26).

In the Senate the same amendment which was first rejected in the House was adopted. The conferees recommended that the Senate recede from the amendment. The conference report was agreed to in both Houses, and the bill was passed without the amendment leaving his discretion unfettered. (R. 27).

The legislative history of the act of 1907 makes clear that the issue presented was whether Congress would leave to the Postmaster General the discretion he then exercised in choosing a divisor for ascertaining average weight, or whether Congress would specifically enact what divisor should be used. The former course having been chosen, this action may fairly be said to have been congressional recognition of the Postmaster General's discretion.

Like recognition has subsequently been given. The Senate Post Office Committee reported an amendment to the post office appropriation bill of 1909, which fixed the divisor to be used in ascertaining average daily weight of mails. The amendment failed when the House refused to adopt it. In the Senate the active member of the committee, in explaining the bill, stated that the amendment was intended to crystalize into law the requirement that

seven days instead of six be used as a divisor. The chairman of the committee in the House declared that the provision "makes permanent law what is now known as the divisor. It is now but a departmental official order, subject to change or repeal by any subsequent official in control of the department. By making it permanent law, we avoid that possibility." (Finding XV, R. 33.)

As a matter of fact, in the annual reports for the year 1907 and following, the Post Office Department calculated its estimate of expenses for railroad mail transportation upon the application of the divisor established by Order No. 412, and its estimates for appropriations since 1907 have been prepared upon that basis. The reports have stated this fact and that the railroads were dissatisfied with Order 412, and had filed suits calling into question its validity (Finding XIII, R. 33, 34). Congress made its appropriations according to the estimates.

The failure of Congress, since 1907, to establish by legislation a definite divisor, indicates its willingness to leave the choice of a divisor to the discretion of the Postmaster General. It might be argued that in view of the long practice of the Post Office Department in using as a divisor a multiple of 6, Congress prior to 1907 considered the discretion of the Postmaster General in this respect of theoretical rather than practical importance. Since Order 412 went into effect, and the controversy over it arose, this can no longer be argued. Congress has left discretion in the Postmaster General, notwithstanding its knowl-

edge of the importance of the discretion given him and that in its exercise Order 412 has been used for many years.

VI.

THE DOCTRINE OF EXECUTIVE CONSTRUCTION, IF APPLICABLE HERE, SUSTAINS THE ACTION OF THE POSTMASTER GENERAL.

The appellants in these cases rely principally upon the doctrine of executive construction. This construction may be resorted to only in aid of interpretation and is not allowable to interpret what is in no need of interpretation. It is applied only in cases of ambiguity or doubt, but with language clear and precise, and with the meaning evident, there is no room for construction and consequently no need of anything to give it aid. (*United States v. Graham*, 110 U. S. 219.) Furthermore, the principle must be applied to some right created, accrued, or guaranteed by the construction relied upon, or to contract rights which will be impaired by its abandonment. (*Houghton v. Payne*, 194 U. S. 88; *United States v. Alabama Great Southern Railroad Co.*, 142 U. S. 615-622.)

The doctrine can have no application if the subject matter to which it is sought to apply it was not within the intent of Congress to legislate upon. The act of 1873 did not attempt, nor was it the intention of Congress thereby, to prescribe a specific divisor. The language used, which has been relied upon by appellants to indicate a purpose on the part of Congress to fix a specific divisor, in fact does nothing of the kind, but merely defines the minimum weighing period during which the Postmaster General is directed to

weigh the mails in order to determine the average daily weight. It can not be said, therefore, that with reference to the divisor the statute supplies the first and fundamental essential to the application of the rule.

Furthermore, the doctrine can not be applied excepting where the complainant has a right conferred or guaranteed by the legislation itself. The rule can not be invoked in a matter which is subject to change by the exercise of a discretionary power. It can only be relied upon to hold inviolate relations and rights which have arisen and become fixed in the past, and can control the future relations only when the statute confers or guarantees a right or benefit, and a construction of what the statute means has arisen by long usage. It can not apply, where a discretion remains in an executive to make a new rule as a matter of administration or to adopt a new course of action not in violation of contract or vested rights, to govern future relations, as in the case at bar.

Here the only thing done was a construction that the statute gave to the Postmaster General the power to adopt a single divisor applicable to all cases under existing conditions. The Postmaster General adheres to that construction, and so adhering, asserts the right to adopt the divisor now applicable to the subject under present conditions.

The rule insisted on by the claimants justifies the Postmaster General in adopting a six-day divisor in 1873 and a seven-day divisor in 1907. In both years he has construed the law to authorize him to adopt that

single divisor best adapted to arrive at average daily weights of the mails under circumstances existing at the particular time in order to carry out the law.

VII.

THE CONSIDERATIONS WHICH LED TO THE SELECTION OF A SIX-DAY DIVISOR IN 1873 CALLED FOR THE SELECTION OF A SEVEN-DAY DIVISOR IN 1907. ORDER 412 WAS A PROPER EXERCISE OF THE POSTMASTER GENERAL'S DISCRETION.

The Government's position here is that the Postmaster General exercised a sound discretion in the selection of both the divisor in 1873 and in 1907.

The annual report of the Postmaster General shows the relative importance of the six-day and the seven-day routes in 1873. (Table B, Annual Report, Postmaster General, 1873.) There were 781 railroad mail routes, on 684 of which the mails were carried only on six days of the week and on 97 on seven days of the week. The annual rate of pay on the former was \$4,703,543, and on the latter, \$2,553,653. The aggregate mileage of the former was 48,444 miles and of the latter, 15,013 miles. (Opinion of Court, Rec. 56.)

The annual reports for 1904, 1905, 1906, and 1907 show the situation for 1907 (Table B, Annual Reports, Second Assistant Postmaster General, 1904, 1905, 1906, and 1907). There were 1,394 six-day routes and 1,604 seven-day routes. The annual rate of pay on the former was \$3,253,305, and on the latter \$41,817,100. The aggregate mileage of the former was 48,705 miles, and of the latter 153,596 miles. (Rec. 56.)

It will be seen at a glance that there had been a complete change in the relation of the two classes of routes. From a predominance of six-day routes and pay in 1873 the change had swung to a still greater predominance of the seven-day routes and pay in 1907. (Congressional Joint Committee on postage and second-class mail matter and compensation for the transportation of mail, hearings, Jan. 16, 1914, pp. 987, 1024.)

The propriety of the action of the Postmaster General, as an exercise of discretion, is in no wise in issue in this case; but, if it were, no sounder reason or justification would be necessary in its support than these facts.

As the majority report of the Post Office and Post Roads Committee of the House stated in its report on the appropriation bill of 1907:

The general development in the commerce of the country and the changes in the methods of business have fixed pretty definitely 365 days as the commercial year. While in some sections of the country, particularly in New England States, trains are not operated upon Sunday to the same extent as the other six days of the week, nevertheless there is a constant increase of the practice of daily service throughout the country. (H. Rept. No. 7312, 59th Cong., 2d sess., p. 5.)

CONCLUSION.

It is submitted that the judgments of the Court of Claims were correct and should be affirmed.

DECEMBER, 1919.

ALEX. C. KING,
Solicitor General.

LARUE BROWN,
JOSEPH STEWART,
Special Assistants to the Attorney General.



(26,503)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 445.

NORTHERN PACIFIC RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 I. *Petition and Appendix "A."* Filed Jan. 13, 1912.

In the Court of Claims of the United States.

No. 31304.

NORTHERN PACIFIC RAILWAY COMPANY

vs.

THE UNITED STATES.

Filed Jan. 13, 1912.

Petition.

To the Honorable the Chief Justice and Associate Justices of the Court of Claims:

Your petitioner, the Northern Pacific Railway Company, respectfully represents:

I.

2 Petitioner is a corporation organized and existing under the laws of the State of Wisconsin, and owns and operates, and at the times hereafter stated did own and operate, a system of railway extending from Ashland, Wisconsin, and St. Paul, Minnesota, on the east, to the cities of Portland, Oregon, and Tacoma and Seattle, Washington, on the west, and is operating also branch lines and extensions from the main lines of said system, over all of which said lines and branches petitioner is now, and at the times hereinafter stated was, transporting the United States mails.

II.

That petitioner is the lawful successor of the Northern Pacific Railroad Company, a corporation created by the act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route" (13 Stats., p. 365), and as such successor became entitled to receive and enjoy the grants of right of way and of the public lands made by the aforesaid act of Congress, and subject to the rights, duties and obligations thereby imposed, including the express agreement made in section 11 thereof:

"That said Northern Pacific Railroad, or any part thereof, shall be a post route and a military road, subject to the use of the United States, for postal, military, naval, and all other Government service,

and also subject to such regulations as Congress may impose restricting the charges for such Government transportation."

3 That by reason of its ownership of other parts of the Northern Pacific Railway System your petitioner is further subject to the land-grant conditions expressed in the act of Congress approved May 5, 1864 (13 Stats., p. 64), entitled, "An act to make a grant of lands to the State of Minnesota to aid in the construction of a railroad from St. Paul to Lake Superior," wherein, and among other considerations moving the United States in the making of said grant, it was provided:

"Sec. 7. And be it further enacted, That the United States mail shall be transported over said road, under the direction of the Post-Office Department, at such price as Congress may by law direct: Provided, That until such price is fixed by law the Postmaster-General shall have the power to determine the same."

That by reason of its ownership of other parts of the Northern Pacific Railway System your petitioner is further subject to the land-grant conditions expressed in the act of Congress approved March 3, 1865 (13 Stat., p. 526), entitled, "An act extending the time for the completion of certain land-grant railroad in the States of Minnesota and Iowa, and for other purposes," wherein, and among other considerations moving the United States in the making of said grant, it was provided:

4 "Sec. 8. And be it further enacted that the United States mail shall be transported on said road, under the direction of the Post-Office Department, at such price as Congress may by law provide: Provided, That until such price is fixed by law the Postmaster-General shall have the power to fix the rate of compensation."

And your petitioner is also subject to the terms, conditions and requirements of section 214 of the act of Congress of June 8, 1872, entitled, "An act to review, consolidate and amend the statutes relating to the Post-Office Department," 17 Stats., p. 309, which provide as follows:

"Sec. 214. That all railway companies to which the United States have furnished aid by grant of lands, right of way, or otherwise, shall carry the mails at such prices as Congress may by law provide; and, until such price is fixed by law, the Postmaster-General may fix the rate of compensation."

III.

That your petitioner is now, and, at all times hereafter stated was, a common carrier for hire and reward, and that in the transportation by it of the United States mails over its several lines of railway, as aforesaid, the initial and terminal points of the several mail routes thereover, as fixed by the Post-Office Department, and the number given by said Department to each of said routes, is shown by the schedule hereunto annexed, marked "A," and made a part of this petition.

5

IV.

That the act of Congress approved June 8, 1872, entitled, "An act to revise, consolidate and amend the statute relating to the Post-Office Department," contained, among others, the following section:

"That the Postmaster-General shall arrange the railway routes on which the mail is carried, including those in which the service is partly by railway and partly by steamboat, into three classes, according to the size of the mails, the speed at which they are carried, and the frequency and importance of the service, so that each railway company shall receive, as far as practicable, a proportionate and just rate of compensation, according to the service performed" (17 Statutes at Large, p. 309.)

In undertaking to apply this section the Postmaster-General found that, with such authority and facilities as he had, the satisfactory determination of the quantities of mail carried by the railway companies would be extremely difficult, and, because of a recommendation in his report for the fiscal year ending June 30, 1872, Congress, in an act approved March 3, 1873, making appropriation for the expenses of the Post-Office Department for the fiscal year ending June 30, 1874, provided for the ascertainment of the weights of the mails carried on railroad routes, as follows:

6 "For increase of compensation for the transportation of mails on railroad routes upon the condition and at the rates hereinafter mentioned, five hundred thousand dollars, or so much thereof as may be necessary: Provided, That the Postmaster-General be, and he is hereby, authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned to wit: That the mails shall be conveyed with due frequency and speed; that sufficient and suitable room, fixtures and furniture, in a car or apartment properly lighted and warmed, shall be provided for route agents to accompany and distribute the mails, and that the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars; five hundred pounds, seventy-five dollars; one thousand pounds, one hundred dollars; one thousand five hundred pounds, one hundred and twenty-five dollars; two thousand pounds, one hundred and fifty dollars; three thousand five hundred pounds, one hundred and seventy-five dollars; five thousand pounds, two hundred dollars, and twenty-five dollars additional for every additional two thousand pounds, the average weight to be ascertained in every case, by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times, after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster-General may direct" (17 Statutes at Large, sec. 1, p. 558).

This section remained in effect until the passage of an act by Con-

gress approved March 3, 1905 (33 Stats., p. 1082), providing for the expense of the postal service for the year ending June 30, 1906. By that act (of March 3, 1905) the Postmaster-General was directed to ascertain the average weight of mails on each railroad route by causing the mails to be weighed for not less than ninety (90) "successive working days" after June 30, 1906, and thereafter, for the same period, not less frequently than once in four years. These enactments (of June 8, 1872, and March 3, 1905) are still in effect, and under them, and the said act of March 3, 1873, the mails transported by your petitioner on said routes have been weighed for the term respectively prescribed once in each four years, and the result stated and verified in the form and manner directed by the Postmaster-General.

V.

That both before and since the passage of said act of March 3, 1873, and to the present time, trains were operated by many of the railway companies of the United States on the secular days alone, and many trains operated by other companies on Sunday, 8 corresponding with trains which carried the mails on secular days, did not carry any mails. The delivery of a large part of the mails, over these lines where none was carried on Sunday, was necessarily retarded one day or more; and additional delay frequently resulted from the accumulation of mails thus arising through the first secular day. As a rule the delivery of the mails was, and it still is, much more even and prompt throughout the week when trains were and are operated and mails carried every day. During said period many trains were operated on less than six of the secular days and not on Sunday, and those carried mails which were accumulated during the days when they were not operated, and there was a corresponding delay of delivery in the mails so accumulated as compared with those carried on trains operated every day of the week.

VI.

That the said provision in the act approved June 8, 1872, was practically a copy of a clause in an act of Congress approved March 3, 1845 (5 Stats. at L., p. 738). Beginning in the year 1867, and for the purpose of fixing the compensation of the railroad companies, for contract periods of four years for transporting the United States mails, the mails carried by such railroad companies were weighed, or the weights thereof were estimated, by the railroad companies themselves, under directions of the Postmaster-General, 9 for thirty consecutive working days designated by him, and also for all Sundays intervening among such working days on which mails were transported; but, without regard to the number of days in the week on which the trains were operated and mails carried, the aggregate weights of the mails so ascertained were divided by the full number of secular or working days (to the exclusion of Sundays) included in the weighing period in order to deter-

mine the average daily weights of mails carried. The act of Congress approved March 3, 1875, making appropriations for expenses of the Post-Office Department for the fiscal year terminating on June 30, 1876, contains the following provision relating to the duties of the Second Assistant Postmaster-General:

"And he is hereby directed to have the mails weighed as often as now provided by law by the employees of the Post-Office Department, and have the weights stated and verified to him by the said employees under such instructions as he may consider just to the Post-Office Department and the railroad companies" (18 Stats. at L., p. 341).

In the year 1867 and thereafter the weighings of the mail for the purpose of fixing the basis for computing the compensation of the railroad companies, including your petitioner, were conducted by the Post-Office Department, and until the year 1907 there

10 was no change made in the plan as above set forth of weighing and of computing the average daily weights of the mails.

Prior to the year 1907, regardless of the number of days on which trains were operated and mails carried by your petitioner and the other mail-carrying railways, the mails carried by them were weighed on all the days of service falling among the designated working days, and the aggregate weights for the weighing period were divided by the full number of secular days only in such period, in order to determine the average daily weights of the mails carried and to fix the basis upon which the compensation of your petitioner and the other mail-carrying railroads should be computed. Your petitioner avers that from the year 1867 down to June 30, 1907, the mail-carrying railways of the country have, for transporting the United States mails, received compensation based upon daily average weights of mails determined by the use of the number of secular or working days only as a divisor as hereinabove stated.

The Second Assistant Postmaster-General, in his report for the year 1878 (page 61), said:

"In 1867 the service rendered by railroad companies was gauged by the system substantially embodied in the act of 1873."

This report was communicated to Congress as a part of the report of the Postmaster-General for that year.

11

VII.

That one of the purposes of said enactments of June 8, 1872, March 3, 1873, and March 3, 1875, was that railroad companies transporting the mails every day in the week, and thereby furnishing a better service, should not receive less compensation for the same aggregate weights of mail carried during the same periods than companies which transported the mails a less number of days in the week.

When preparing to put into effect said acts of Congress approved March 3, 1873, and March 3, 1875, the postal authorities conferred with many managers of railroad companies, and agreed with them that the purposes of Congress could not be effected and justice done

to the railroad companies except by said existing plan of weighing the mails for every day of service included in the weighing periods and dividing the total weights by the full number of secular days included in said periods. In the year 1875 the Postmaster-General reported to Congress that the pay of all railroad companies for carrying the mails was then fixed on the basis of weights carried, and that the Post-Office Department and the railroad managers were in full agreement upon the methods of weighing and of determining the average weights, as hereinabove set out.

12

VIII.

That, while construing and applying the laws in the way hereinbefore stated, officers of the Post-Office Department at times expressed their disapproval of the method established as aforesaid for arriving at the basis upon which to determine the rates of compensation to be paid railroad companies for carrying the mails. The Postmaster-General, in a report for the fiscal year ending June 30, 1881, and the Second Assistant Postmaster-General, in a report for the fiscal year ending June 30, 1882, expressed unfavorable views on the existing law with respect to said method. In a report for the fiscal year ending June 30, 1884, the Postmaster-General made similar criticisms of said law, and on his recommendation a bill was introduced in the House of Representatives to strike out the word "working" from the phrase "working days" in said act approved March 3, 1873; but no action was taken by the House on said bill. In September, 1884, the Postmaster-General also prepared an order in the words following:

"Order No. 44.—Hereafter when the weight of mails is taken on the railroad routes performing service seven days per week the whole number of days the mails are weighed, whether thirty or thirty-five, shall be used as a divisor for obtaining the average weight per day."

13

Deferring the promulgation of said order, the Postmaster-General addressed a communication to the Attorney-General in which he showed the operation of the law in said particular, as construed by himself and his predecessors, to be as herein alleged, and inquired the opinion of the Attorney-General as to the proper construction of the same. In a reply of date October 31, 1884, the Acting Attorney-General communicated to the Postmaster-General his opinion that said construction of said act, on which the postal authorities had been and were acting, was correct, and that any departure from that construction "would defeat the intention of the law" (18 Attorney-General's Opinions, p. 71). In consequence of said opinion of the Attorney-General the Postmaster-General refrained from enforcing or promulgating his said order.

IX.

That, complying with a resolution adopted by the Senate on January 19, 1885, the Postmaster-General, on January 21, 1885, trans-

mitted to the Senate a letter in which he gave "a documentary history of the railway mail service from its origin in 1834 to the present time." Said communication contains the following explanation of the existing system of weighing the mails and computing the daily average weights:

14 "Some little controversy at one time existed as to the justice of the present methods of obtaining the average daily weight to be taken as a basis for determining the annual pay, but a little examination made it clear that no other way of proceeding could be so just as that now in vogue.

* * * * *

"The present rule is, on those roads carrying the mails six times a week, to weigh the mails on thirty consecutive days on which the mails are carried, which would cover a period of thirty-five days; dividing the aggregate thirty weighings by thirty will give the daily average. On those roads carrying the mails seven times per week the weighing is done for thirty-five consecutive days (including Sundays) and the aggregate divided by thirty for a basis of pay.

"It is evident that the period during which the weighing is continued covers, in both cases, all the mails carried for thirty-five days. If, in the second case, we should take our basis from an average obtained by dividing the aggregate weight by thirty-five we would commit the absurdity of putting a premium upon inefficiency, for evidently if the Sunday train were cut off we should virtually have the same mails less frequently carried, and therefore with a higher daily average, and therefore a higher pay basis than in the case where the seventh train was run and the greater accommodation rendered.

"The present method gives no additional pay for the additional train, but the other method would cause a reduction on account of better service, and practically would operate as a fine on all
15 those roads carrying the mails daily, and including Sunday"
(Senate Ex. Doc. 40, 48th Congress, 2d Session).

X.

That during the thirty-four years following the enactment of March 3, 1873, rates paid to railroad companies, including your petitioner, under said acts, for transporting the mails, the apportionment of pay between relatively small and relatively large quantities of mail and said plan established and applied in determining the average daily weights for which the carriers should be paid were many times discussed by committees of both houses of Congress, by commissions appointed by Congress to investigate and make recommendations regarding the postal service, by chairmen of committees and other members, in open session of both of said houses.

XI.

That at the second session of the Fifty-ninth Congress the committee of the House of Representatives on Post Offices and Post Roads

prepared a bill, which was passed after much debate and amendment in both houses, entitled, "An act making appropriations for the fiscal year ending June 30, 1908, and for other purposes," being
16 approved on March 2, 1907. In said bill said committee inserted a provision that the Postmaster-General should cause the mails to be weighed once in each four years' period, commencing June 30, 1907, for not less than one hundred and five (105) "successive days," and that in ascertaining the daily average weight of mails carried by the railroad companies, including your petitioner, the total for said weighing period should be divided by said full number of days. In reporting said bill to the House the chairman of said committee spoke at length of the history of said divisor theretofore used in fixing the average weights of the mails, and informed the House of the conditions, hereinbefore recited, which caused the establishment of the same; of said report of the Postmaster-General for the year 1875, and of said contemplated order of the Postmaster-General of September, 1884, the adverse opinion of the Attorney-General thereon and the cancellation thereof. After debate occupying parts of five days the House rejected said provision in the appropriation bill. Subsequently during said session said plan reported by the committee for calculating the weights of the mails was three times brought before the House and each time the House rejected it.

XII.

That by an act of Congress approved July 12, 1876, first effective for the fiscal year ending June 30, 1877, the rates of pay with
17 respect to weight of mails authorized by said act of March 3, 1873, were reduced ten (10) per cent, and by an act approved June 17, 1878, a reduction of five (5) per cent was made from the rates resulting from the act of July 12, 1876. Thereafter the law was not changed with regard to the rates to be paid railroad companies for carrying the mails until the passage of said act of March 2, 1907. The text of that part of said act which relates to the rates of pay with respect to weight of mails is as follows:

"The Postmaster-General is hereby authorized and directed to readjust the compensation to be paid from and after the first day of July, nineteen hundred and seven, for the transportation of mail on railroad routes, carrying their whole length an average weight of mails per day of upward of five thousand pounds by making the following changes in the present rates per mile per annum for the transportation of mail on such routes, and hereafter the rates on such routes shall be as follows: On routes carrying their whole length an average weight of mail per day of more than five thousand pounds and less than forty-eight thousand pounds the rate shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds, and on routes carrying their whole length an average weight of mail per day of more than forty-eight thousand pounds the rates shall be five per centum less than the present rates
18 on all weight carried in excess of five thousand pounds up to forty-eight thousand pounds, and for each additional two thousand pounds, in excess of forty eight thousand pounds

at the rate of nineteen dollars and twenty-four cents upon all roads other than land-grant roads, and upon all land-grant roads the rate shall be seventeen dollars and ten cents for each two thousand pounds carried in excess of said forty-eight thousand pounds" (34 Stats. at L., p. 1212).

That notwithstanding the refusal of Congress to change the law in accordance with the recommendation of the Post-Office Department (see ante, section VIII) with respect to the ascertainment of the average daily weights of mail carried by the railroad companies, including your petitioner, the Postmaster-General decided that he would, in actual practice, change the method of ascertaining the average daily weights of the mail so as to conform to his views, as embodied in said recommendation, by including in the divisor all Sundays on which the mails were weighed, and he, to this end, and in excess of his powers under the law then and now in force, on March 2, 1907, and June 7, 1907, respectively, issued and subsequently enforced the following orders, by which the divisor was unlawfully increased, and your petitioner's compensation for transporting the United States mails thereby unlawfully reduced as hereinafter set forth:

19 "Order No. 165: That when the weight of mail taken on railroad routes the whole number of days the mails are weighed shall be used as a divisor for obtaining the average weight per day."

"Order No. 412: Ordered, that Order 165, dated March 2, 1907, be, and the same is hereby, amended to read as follows:

"That when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day."

XIII. .

That for many years it has been the practice and custom of the Post-Office Department to contract with the railroad companies, including your petitioner, for carrying the United States mails, by transmitting to them agreements (otherwise called "Distance Circul-
lars") to be filled out, signed and returned by the railway companies to said Department.

20 That in accordance with such practice, and following said custom, the Second Assistant Postmaster-General, in or about the month of June, 1907, to close agreements with your petitioner for the transportation by it of the United States mails on its routes Nos. 139067, 141001, 141007, 141008, 141011, 141033, 141035, 141036, 141042, 141046, 141051 and 141061 (see Appendix "A" for termini) during the four fiscal years commencing July 1, 1907, mailed to your petitioner, with reference to each of said routes, a printed form (Distance Circular), on which it was requested that the distances between all stations on the road be stated, and your petitioner's consent to render the service proposed on the basis of those distances and for the compensation therefor to be fixed in

accordance with the law, and with "the regulations of the Department applicable to railroad mail service" be noted.

That in accordance with the same practice, and following the same custom, the Second Assistant Postmaster-General in or about the month of February, 1910, to close agreements with your petitioner for the transportation by it of the United States mails for the other mail routes on your petitioner's lines of railway, as noted in the Appendix "A" hereto, for the four fiscal years beginning July 1, 1910, mailed to your petitioner, with reference to each of said routes, a like printed form on which it was also requested that the distances between all stations on the route be stated, and your petitioner's consent to render the service proposed on the basis of those distances and for the compensation therefor to be fixed in accordance with the law, and with "the regulations of the Department applicable to railroad mail service," be noted.

The regular form of agreement between the Post-Office Department and your petitioner covering each and all of the above
21 named routes, is printed on page two of said form, and is in the following words, to wit:

"The company named below agreed to accept and perform mail service upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail service."

That said agreements with reference to all of the routes hereinabove mentioned and shown upon the Appendix "A" hereto attached, and made a part of this petition, was signed by your petitioner's duly authorized official, but before doing so he added, so as to appear over his official signature, the following words:

"Exception taken to Order No. 165, issued by the Postmaster-General March 2, 1907, and Order No. 412, issued June 7, 1907."

After signing said agreements (Distance Circulars), relating to the weighing of the year 1907, upon the routes as herein named as Nos. 139067, 141001, 141007, 141008, 141011, 141033, 141035, 141036, 141042, 141046, 141051, 141061 and 141066, they, together with the following letter of protest, signed by your petitioner's authorized attorneys, were delivered, on or about June 18, 1907, to the Second Assistant Postmaster-General:

22

"WASHINGTON, D. C., June 18, 1907.

"The Hon. Second Assistant Postmaster-General, Division of Railway Adjustment, Washington, D. C.

"SIR: We now return herewith, duly completed and executed, the Official Distance Circulars for those mail routes comprised by the lines of our company in Wisconsin and Minnesota, being Nos. 139067, 141001, 141007, 141008, 141011, 141033, 141035, 141036, 141042, 141046, 141051, 141061, and 141066, which have been prepared for your use in effecting readjustment of mail compensation in connection with the weighing which has just been completed.

"Without undertaking to materially change the form of the contract printed at the top of the second page of each circular, and signed by our General Manager, we have nevertheless taken the liberty of adding thereto a formal exception to both order No. 165, issued by

the Postmaster General on March 2, 1907, and Order No. 412, issued by the Postmaster-General on June 7, 1907. The contract in question obligates our company 'to accept and perform mail service upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail pay,' and we therefore beg leave to now formally advise, in submitting these Distance Circulars, that the service involved is accepted and our company agrees to perform same, with the proviso that by thus subscribing and delivering these circulars to the Department, our company does not agree to submit to any but lawful regulations by the Department, and on this point

23 our company does not concede the power of the Postmaster-General, through an order or through any other act of the Post-Office Department, to provide for changing the method of ascertaining the daily average weight of the mails carried over the routes named on the Distance Circulars herewith, unless authorized by proper Congressional enactment. In the view of our company there is no authority whatever in existing legislation for the aforesaid Orders Nos. 165 and 412, issued March 2, 1907, and June 7, 1907, respectively.

"The mails will be transported by our company, of course, as required by the public necessity, pending settlement of the rights of our company and of the United States in the question involved, i. e., the matter of ascertaining the average daily weights, with the consequent annual compensation for services performed over the route covered by the Distance Circulars herewith. In addition to thus assuring the transportation of the mails as heretofore, by way of adequately fulfilling the public necessities, we now record our company's formal refusal to accept the proposed method of ascertaining the average daily weight of mails carried, and fixing the annual rates of pay as provided by the orders of the Postmaster-General heretofore described, and our company also reserves all of its rights in the premises to hereafter take such action as may be found requisite toward determining the legal method of ascertaining the daily average weights of mails carried over each route, and the correct and legal rates of compensation for the services so rendered, in accord with the existing legislation which controls the matters involved.

24

"We trust that appropriate adjustment in this connection may be effected without further material difficulty.

"Very respectfully,

"(Signed)

BRITTON & GRAY,

"Attorneys Northern Pacific Railway Co.

"(Enclosures.)"

And in returning the Distance Circulars for the weighing of 1910 to the Post-Office Department, same were also accompanied by a formal communication by the authorized attorneys of the petitioner, which reads as follows:

"JULY 11, 1910.

"Hon. Second Assistant Postmaster-General, Division of Railway Adjustment, Washington, D. C.

"DEAR SIR: We enclose herewith properly filled out and signed Distance Circulars covering routes of the Northern Pacific Railway Company for the term beginning July 1, 1910, as follows:

"Route	Nos.	161005,	161006,	161007,	161013,	161016,
161017,	161025,	161030,	161036,	161041,	163002,	163003,
163004,	163007,	163008,	163009,	163011,	163012,	163013,
163014,	163017,	163020,	163022,	170003,	170008,	170011,
171001,	171005,	171009,	171012,	171013,	171015,	171016,
171018,	171019,	171020,	171021,	171025,	171029,	171030,
171032,	171035,	171037,	171043,	171044,	171045,	171053,
171054,	171062,	171064,	171070,	173016,		

25 "You will note that our company agrees to accept and perform mail service over the above routes upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail service, except those carried by Order No. 165, issued by the Postmaster-General, March 2, 1907, and Order No. 412, issued by the Postmaster-General, June 7, 1907.

"Very respectfully,

"(Signed)

BRITTON & GRAY,

"Att'ys Northern Pacific R'y Co.

"(Enclosures.)"

Petitioner further avers that the modification made in the formal agreements as above set forth were made by your petitioner covering each and all of the above-mentioned mail routes, which agreements, together with the letter of protest as above set forth, were on file with the Post-Office Department at the beginning of the contract periods, respectively, for each of said routes. Under said protests your petitioner has since performed the services so required and provided for and has received under such protests the mail pay warrants delivered to your petitioner for the amounts of its compensation therefor as determined by the application of said Order No. 412 earned during the fiscal years ending June 30, 1908, June 30, 1909, June 30, 1910, and June 30, 1911. And your petitioner further avers that because

26 of the duties and obligations imposed upon it by law as a common carrier, and especially because of the land-grant conditions hereinabove set forth, it was powerless to exercise the alternative of refusing to transport the United States mails when tendered to it for carriage. For which reasons also your petitioner protested always, as hereinafter set forth, against said Orders Nos. 165 and 412 of the Postmaster-General, as not representing the method prescribed by law of ascertaining the basis upon which your petitioner's compensation for carrying the mails should be computed; and your petitioner avers that said orders were not only a wide departure from all antecedent practice of the Post-Office Department, but were and are violative of the express provisions of the law applicable to railway mail service.

XIV.

That the said Orders Nos. 165 and 412, issued by the Postmaster-General as aforesaid, were wrongfully put into effect by that official July 1, 1907, on those mail routes on the lines of railroad owned and operated by your petitioner. The Post-Office Department in putting said orders into effect upon the mail routes of your petitioner's said lines of railway as aforesaid, and calculating the daily average weight of mails carried by your petitioner on its said mail routes by including Sundays in the number of days in the weighing period, thus making the divisor 105 days instead of 90 days, as required by law and the former constant ruling and practice of the Post-Office Department, has caused the mail transportation earnings of your petitioner's said lines of railroad to be unlawfully reduced annually, the amount of which for the fiscal years ended June 30, 1908, June 30, 1909, June 30, 1910, and June 30, 1911, aggregates the sum of, to wit, one hundred and sixty thousand one hundred and fifteen dollars and forty-eight cents (\$160,115.48), all of which will fully appear from the annexed statement, Appendix "A," made part of this petition.

XV.

Your petitioner avers that there rests upon it a high obligation to perform its duties as a common carrier in the territory through which its lines of railway are constructed, and this obligation is the greater because there are no means of speedy transportation in many sections of said territory except over lines owned and operated by it. Your petitioner avers that it has at all times been a common carrier for hire and reward, and as such, as well as under the provisions of the land-grant acts aforesaid, was obliged to carry the United States mails when tendered to it for transportation; that after your petitioner signed the agreements modified by it as above set forth the United States, without any solicitation on the part of your petitioner, continued to tender and deliver to it for transportation its mails just as it had theretofore done; that your petitioner continued to transport said mails whenever they were tendered to it by the United States, and it respectfully insists that it is justly entitled to receive in payment for such services, in addition to the amount which it has heretofore received, as shown by the Appendix "A" annexed hereto, the amount here sued for, as the sum of said two amounts represents the compensation which your petitioner should receive if computed in accordance with the express provisions of the law applicable to railway mail service.

XVI.

Your petitioner is advised, and it so avers, that the issuance and application by the Postmaster-General of said Orders Nos. 165 and 412, dated respectively March 2, 1907, and June 7, 1907, by which the divisor for ascertaining the average daily weights of mails carried by your petitioner was changed from ninety days to one hundred

and five days, as above stated, were and are in excess of the authority vested in that officer by law, and in violation of the legal rights of your petitioner under the above-mentioned acts of Congress and the interpretation given thereto by both the postal authorities and the Attorney-General of the United States for many years prior to the

29 date of said orders; that the said sum of money shown to be due your petitioner by the annexed tabulated statement, Appendix "A," is justly due and owing to it by the United States, the same having been and still being unlawfully withheld from your petitioner by the United States and its postal authorities in the manner and for the reasons herein set forth; and that there exists in favor of the United States against your petitioner no debt, claim or set-off by which the said amount herein prayed for may or should be reduced.

Your petitioner prays, therefore, that this honorable court will render a judgment in its favor against the United States in the full sum of one hundred and sixty thousand one hundred and fifteen dollars and forty-eight cents (\$160,115.48), the same being due and wholly unpaid.

NORTHERN PACIFIC RAILWAY
COMPANY,

By HOWARD ELLIOTT,
President.

30 STATE OF MINNESOTA,
County of Ramsey, ss:

Before me, F. J. Gehan, a notary public in and for the State and county aforesaid, appeared Howard Elliott, known to me to be the president of the Northern Pacific Railway Company, and made oath before me that the allegations of said petition are true to the best of his knowledge, information and belief.

HOWARD ELLIOTT.

Subscribed and sworn to before me this 5th day of January, A. D. 1912.

F. J. GEHAN,
Notary Public, Ramsey County, Minnesota.

My commission expires April 5, 1918.

BRITTON & GRAY,
Attorneys for Claimant.

C. W. BUNN,
General Counsel.

APPENDIX A

NORTHERN PACIFIC RAILWAY COMPANY.

Statement Showing Loss in Mail Pay from July 1, 1907, to September 30, 1909, under Order No. 412 of the Postmaster General dated June 7, 1907, which provides that the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day.

Routes Weighed February 20—June 4, 1907.

Route.	From—	To—	105-day divisor.	90-day divisor.	Loss per annum.	Loss per quarter.	Total loss July 1, '07, to Sep. 30, '09, a years & 3 mos.
139067.	Ashland.	Superior, Wis.	\$3,846.16	\$4,123.94	\$277.78	\$69.44	\$625.00
141001.	St. Paul, Minn.	Fargo, N. D.	129,430.87	146,543.25	17,112.38	4,278.09	38,502.85
141007.	"	Duluth, Minn.	23,511.21	24,947.20	1,435.99	359.00	3,230.97
141008.	White Bear.	Stillwater, "	Minimum rate, not affected.				
141011.	Superior, Wis.	Staples, "	15,809.15	16,599.33	790.18	197.54	1,777.90
141033.	Wyoming, Minn.	Taylor's Fls., "	1,300.80	1,385.37	84.57	21.14	190.28
141035.	Duluth.	Fond du Lac, "	1,095.54	1,703.95	68.41	17.10	153.92
141036.	Carlton.	Cloquet, "	411.97	433.65	21.68	5.42	48.78
141042.	Wadena Jct.	Wahpeton, N. D.	7,096.41	7,747.50	651.09	162.77	1,464.95
141046.	Brainerd.	Morris, Minn.	9,015.71	9,687.61	671.90	167.97	1,511.77
141051.	Rush City.	Grantsburg, Wis.	1,004.00	1,091.32	87.32	21.83	196.47
141061.	Winnipeg Jct.	Grand Forks, N. D.	10,155.65	11,219.88	1,064.23	266.06	2,394.51
Total.....							\$5,566.36
							\$50,097.40

Losses by Quarters for Each Route.

Route.	139067	141001	141007	141011	141033	141035	141036	141042	141046	141051	141061	Total.
Quarter ending												
Sept. 30, 1907.	\$69.44	4,278.09	359.00	197.54	21.14	17.10	5.42	162.77	167.97	21.83	266.06	\$5,566.36
Dec. 31, 1907.	69.44	4,278.09	359.00	197.54	21.14	17.10	5.42	162.77	167.97	21.83	266.06	5,566.36
Mar. 31, 1908.	69.45	4,278.10	359.00	197.55	21.14	17.10	5.42	162.77	167.98	21.83	266.06	5,566.40
June 30, 1908.	69.45	4,278.10	358.99	197.55	21.15	17.11	5.42	162.78	167.98	21.83	266.05	5,566.41
Sept. 30, 1908.	69.44	4,278.09	359.00	197.54	21.14	17.10	5.42	162.77	167.97	21.83	266.06	5,566.36
Dec. 31, 1908.	69.44	4,278.09	359.00	197.54	21.14	17.10	5.42	162.77	167.97	21.83	266.06	5,566.36
Mar. 31, 1909.	69.45	4,278.10	359.00	197.55	21.14	17.10	5.42	162.77	167.98	21.83	266.06	5,566.40
June 30, 1909.	69.45	4,278.10	358.99	197.55	21.15	17.11	5.42	162.78	167.98	21.83	266.05	5,566.41
Sept. 30, 1909.	69.44	4,278.09	358.99	197.54	21.14	17.10	5.42	162.77	167.97	21.83	266.05	5,566.34
Totals....	\$625.00	38,502.85	3,230.97	1,777.90	190.28	153.92	48.78	1,464.95	1,511.77	196.47	2,394.51	50,097.40

Statement Showing Loss in Mail Pay from October 1, 1909, to June 30, 1911, under Order No. 412 of the Postmaster General dated June 7, 1907, which provides that the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day.

Routes Weighed February 20th to June 4th, 1907.

Route.	From—	To—	100-day divisor.	90-day divisor.	Loss per annum.	Loss per quarter.	Total loss Oct. 1, '09, to June 30, '11, 1 year & 9 mos.
139067.	Ashland.	Superior, Wis.	\$3,846.16	\$4,123.94	\$277.78	\$69.44	\$416.67 To Mar. 31, 1911.
"	"	"	3,825.16	4,101.42	276.26	69.06	69.06 Apl., May & June, 1911.
141001.	St. Paul.	Fargo, N. D.	129,430.87	146,543.25	17,112.38	4,278.09	12,834.27 To June 30, 1910.
"	"	"	129,685.34	146,831.36	17,146.02	4,286.50	17,146.02 July 1/10-June 30/11.
141007.	"	Duluth, Minn.	23,511.21	24,947.20	1,435.99	359.00	2,512.98
141008.	White Bear.	Stillwater, Minn.		(Minimum rate not affected.)			
141011.	Superior, Wis.	Staples, Minn.	15,800.15	16,599.33	790.18	197.54	1,382.80
141033.	Wyoming, Minn.	Taylor's Falls, Minn.	1,300.80	1,385.37	84.57	21.14	147.99
141035.	Duluth.	Fond du Lac.	1,695.54	1,763.95	68.41	17.10	119.71
141036.	Carlton.	Cloquet.	411.97	433.65	21.68	5.42	37.94
141042.	Wadena Jet.	Wahpeton, N. D.	7,096.41	7,747.50	651.09	162.77	1,139.40
141046.	Brainerd.	Morris, Minn.	9,015.71	9,687.61	671.90	167.97	1,175.81
141051.	Rush City.	Grantsburg, Wis.	1,004.00	1,091.32	87.32	21.83	152.81
141051.	Winnipeg Jct.	Grand Forks, N. D.	10,155.65	11,219.88	1,064.23	266.06	1,064.00 To Sept. 30, 1910.
"	"	"	10,666.60	11,121.49	1,054.89	263.72	791.16 Oct. 1/10-June 30/11.
							<hr/>
							\$38,990.62
							=====

Total loss
July 1, '16, to
June 30, '17,
one year.

161013.	Fargo, N. D.	163,351.88	182,340.88	18,986.00	4,746.50	18,986.00
161005.	"	12,376.02	13,407.35	1,031.33	257.83	1,031.33
161006.	Jamestown.	9,299.89	10,036.56	736.67	181.17	736.67
161007.	Sanborn.	4,525.37	4,848.62	323.25	80.81	323.25
161016.	Grand Forks.	6,762.57	7,245.61	483.04	120.76	483.04
161017.	Wahpeton.	9,491.55	10,106.84	615.29	153.82	615.29
161025.	McKenzie.	1,930.16	1,930.16	(Minimum rate not affected.)		
161030.	Casselton.	3,775.18	3,982.05	206.87	51.71	206.87
161036.	Carrington.	5,902.87	6,340.15	437.28	109.32	437.28
161041.	Oberon.	1,441.94	1,772.92	330.98	82.74	330.98
163014.	Miles City.	206,321.90	228,619.77	22,297.87	5,574.46	22,297.87
153002.	Logan.	21,926.73	24,152.57	2,225.84	556.46	2,225.84
163003.	Whitehall.	2,995.26	3,190.00	194.74	48.68	194.74
163004.	Drummond.	1,206.15	1,274.56	68.41	17.10	68.41
163007.	Clough Jet.	537.79	537.79	(Minimum rate not affected.)		
163008.	Nissoula.	5,545.53	5,989.17	443.64	110.91	443.64
163009.	Butte.	14,964.13	16,424.13	1,460.00	365.00	1,460.00
163011.	Laurel.	3,395.89	3,624.85	228.96	57.24	228.96
163012.	Livingston.	3,122.90	3,402.59	279.69	69.92	279.69
163013.	Siletia.	1,058.88	1,126.12	67.24	16.81	67.24
163017.	De Smet.	10,227.37	10,997.86	770.49	192.62	770.49
163020.	Sappington.	1,003.08	1,074.74	71.66	17.91	71.66
163022.	Harrison.	512.50	518.73	6.22	1.55	6.22
170003.	Wallace	353.08	377.43	24.35	6.08	24.35
170008.	Marshall.	23,890.04	25,117.18	1,227.14	306.78	1,227.14
170011.	Arrow.	4,541.17	4,865.55	324.38	81.09	324.38
171001.	Tacoma	35,778.11	39,260.89	3,482.78	870.69	3,482.78
171005.	Burnett.	285.57	285.57	(Minimum rate not affected.)		

To April 4, 1911.
Apr. 4-June 30/11.

171009.	Spokane.	Auburn	75,175.03	81,637.95	6,462.92	1,615.73	4,918.99
"	"	"	75,160.29	81,621.94	6,461.65	1,612.90	1,543.68
171012.	Seattle.	Tacoma	16,805.48	18,817.90	2,012.42	503.10	2,012.42
171013.	Pasco.	Walla	1,085.21	1,173.78	88.57	22.14	88.57
171015.	Pullman.	Genesee	1,442.93	1,559.16	116.23	29.05	116.23
171016.	Junction.	Fairfax	419.37	419.37	(Minimum rate not affected.)		
171018.	North Bend.	Black River	4,253.34	4,501.43	308.09	77.02	308.09
171019.	Hartford.	Robe	581.40	581.40	(Minimum rate not affected.)		
171020.	Sunas.	Seattle	15,391.14	17,016.34	1,625.20	406.30	1,625.20
171021.	Cheney.	Adrian	12,776.70	13,957.13	1,190.43	297.60	1,190.43
171025.	Attalia.	Dayton	6,171.13	6,606.78	435.65	108.91	435.65
171029.	Centralia.	Gate	888.82	945.15	56.33	14.08	56.33
171030.	Kanaskat.	Keriston	651.08	651.08	(Minimum rate not affected.)		
171032.	Lakeview.	Hoquiam	12,853.90	13,530.89	676.99	169.24	676.99
171035.	Clealum.	Roslyn	174.44	187.17	12.73	3.18	12.73
171037.	Chehalis.	South Bend	5,413.89	5,915.18	501.29	125.32	501.29
171043.	Arlington.	Darrington	1,228.63	1,228.63	(Minimum rate not affected.)		
"	"	"	1,229.05	1,229.05	(Minimum rate not affected.)		
171044.	Bellingham.	Wickersham	1,420.36	1,492.29	71.93	17.98	71.93
171045.	Vancouver.	Yacolt	1,247.97	1,340.42	92.45	23.11	92.45
171053.	Palmer Jct.	Meeker Jct.	2,020.57	2,726.55	705.98	176.49	705.98
171054.	Hoquiam.	Moclips	1,234.75	1,307.53	72.78	18.19	72.78
171062.	Sunnyside.	Grandview	1,312.59	1,450.76	138.17	34.54	138.17
171064.	Coulee City Jct.	Coulee City	178.89	188.44	9.55	2.39	9.55
171070.	Lewiston Jct.	Snake River Jct.	1,937.19	2,063.07	125.88	31.47	125.88
171016.	Hunts Jct.	Pendleton, Ore.	1,732.65	1,732.65	(Minimum rate not affected.)		

Total July 1, 1910, to June 30, 1911 \$71,027.46
Total Oct. 1, 1909, to June 30, 1911 38,000.62

Grand total..... \$110,018.08

Losses by Quarters for Each Route.

Route No. Quarter ending-	139067	141001	41007	141011	141033	141035	141036	141042	141046	141051	141061	Total.
Dec. 31, 1909...	69.44	4,278.09	359.00	197.54	21.14	17.10	5.42	162.77	167.97	21.83	266.06	5,566.36
Mar. 31, 1910...	69.45	4,278.09	359.00	197.54	21.14	17.10	5.42	162.77	167.97	21.83	266.06	5,566.37
June 30, 1910...	69.44	4,278.09	358.99	197.55	21.14	17.10	5.42	162.77	167.98	21.83	266.05	5,566.36
Sept. 30, 1910...	69.45	4,286.50	359.00	197.54	21.15	17.11	5.42	162.78	167.97	21.83	265.83	5,574.58
Dec. 31, 1910...	69.44	4,286.51	359.00	197.54	21.14	17.10	5.42	162.77	167.97	21.83	263.72	5,572.44
Mar. 31, 1911...	69.45	4,286.50	358.99	197.55	21.14	17.10	5.42	162.77	167.98	21.83	263.72	5,572.45
June 30, 1911...	69.06	4,286.51	359.00	197.54	21.14	17.10	5.42	162.77	167.97	21.83	263.72	5,572.06
	\$485.73	20,980.29	2,512.98	1,382.80	147.99	119.71	37.94	1,139.40	1,175.81	152.81	1,855.16	\$8,990.62.
Route No. Quarter ending-	161005	161006	161007	161013	161016	161017	161030	161036	161041	163002	163003	Total.
Sept. 30, 1910...	\$257.83	184.17	80.81	4,746.50	120.76	153.82	51.71	109.32	82.74	556.46	48.68	6,392.80
Dec. 31, 1910...	257.83	184.16	80.81	4,746.50	120.76	153.82	51.72	109.32	82.75	556.46	48.69	6,392.82
Mar. 31, 1911...	257.84	184.17	80.82	4,746.50	120.76	153.82	51.72	109.32	82.74	556.46	48.68	6,392.83
June 30, 1911...	257.83	184.17	80.81	4,746.50	120.76	153.83	51.72	109.32	82.75	556.46	48.69	6,392.84
	\$1,031.33	736.67	323.25	18,986.00	483.04	615.29	206.87	437.28	330.98	2,225.84	194.74	25,571.29

Route No.	163004	163008	163009	163011	163012	163013	163017*	163014	163020	163022	170003	Total.
Quarter ending—												
Sept. 30, 1910...	17.10	110.91	365.00	57.24	69.92	16.81	192.62	5,574.46	17.91	1.55	6.08	6,429.60
Dec. 31, 1910...	17.10	110.91	395.00	57.24	69.92	16.81	192.63	5,574.47	17.92	1.56	6.09	6,429.65
Mar. 31, 1911...	17.11	110.91	365.00	57.24	69.93	16.81	192.62	5,574.47	17.91	1.55	6.09	6,429.64
June 30, 1911...	17.10	110.91	365.00	57.24	69.92	16.81	192.62	5,574.47	17.92	1.56	6.09	6,429.64
	\$68.41	443.64	1,460.00	228.96	279.69	67.24	770.49	22,297.87	71.66	6.22	24.35	25,718.53

Route No.	170008	170011	171001	171009	171012	171013	171015	171018	171020	171021	171025	Total.
Quarter ending—												
Sept. 30, 1910...	306.78	81.09	870.69	1,615.73	503.10	22.14	29.06	77.02	406.30	297.60	108.91	4,318.42
Dec. 31, 1910...	306.79	81.10	870.70	1,615.73	503.11	22.14	29.05	77.03	406.30	297.61	108.91	4,318.47
Mar. 31, 1911...	306.78	81.09	870.69	1,615.73	503.10	22.14	29.06	77.02	406.30	297.61	108.91	4,318.43
June 30, 1911...	306.79	81.10	870.70	1,615.48	503.11	22.15	29.06	77.02	406.30	297.61	108.92	4,318.24
	\$1,227.14	324.38	3,482.78	6,462.67	2,012.42	88.57	116.23	308.09	1,625.20	1,190.43	435.65	17,273.56

Route No.	171029	171032	171035	171037	171044	171045	171053	171054	171062	171064	171070	Total.
Quarter ending—												
Sept. 30, 1910...	14.08	169.24	3.18	125.32	17.98	23.11	176.49	18.19	34.54	2.39	31.47	615.99
Dec. 31, 1910...	14.08	169.25	3.19	125.32	17.99	23.12	176.50	18.20	34.54	2.39	31.47	616.05
Mar. 31, 1911...	14.09	169.25	3.18	125.33	17.98	23.11	176.49	18.19	34.55	2.39	31.47	616.03
June 30, 1911...	14.08	169.25	3.18	125.32	17.98	23.11	176.50	18.20	34.54	2.38	31.47	616.01
	\$56.33	676.99	12.73	501.29	71.93	92.45	705.98	72.78	138.17	9.55	125.88	2,464.08

Total Losses for Each Quarter.

Quarter ending	December 31, 1909.....	\$5,566.36
March	31, 1910.....	5,566.37
June	30, 1910.....	5,566.36
September 30, 1910.....		23,331.39
December 31, 1910.....		23,329.43
March	31, 1911.....	23,329.38
June	30, 1911.....	23,328.79
		<hr/>
July 1, '07-Sept. 30, '09.....		\$110,018.08
		<hr/>
		\$50,097.40
		<hr/>
Total.....		160,115.48

[14560]

39 II. *Supplementary Petition. Filed June 29, 1917.*

To the Honorable Chief Justice and Associate Justices of the Court of Claims:

Comes now the claimant by its attorneys, and adopting the allegations of the original petition for this its supplemental petition, shows to the court the following facts:

I.

That your petitioner has transported mails of the United States during the years ending June 30, 1912, 1913, 1914, 1915,
40 1916, and 1917, as well as during the years ending June 30, 1908, 1909, 1910, and 1911, as set forth in the original petition herein.

II.

That in certifying for payment the petitioner's account for such transportation, the Post-Office Department applied Order 412, dated March 2, 1907, reading as follows:

"That when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day."

That the deduction erroneously made by the Postmaster General and the accounting officers of the United States, on account of the application of said Order 412, resulted in unlawfully reducing compensation justly earned by your petitioner for the transportation of mails, as set forth in the original petition, and as set forth herein, amounting in the years ending June 30, 1912, 1913, 1914, 1915, 1916, and 1917, to the sum of seven hundred fifty thousand dollars (\$750,000.00).

III.

That the total of one hundred sixty thousand one hundred fifteen dollars and forty-eight cents (\$160,115.48) claimed under the
41 original petition, together with the sum of seven hundred fifty thousand dollars (\$750,000) claimed under this supplemental petition, is now justly due and owing to your petitioner from the United States; that there exists in favor of the United States no debt, claim or set-off by which said amount should be reduced, and that no part of said claim has been paid and the said claim has not been assigned in whole or in part.

Wherefore, your petitioner prays for judgment against the United States in the sum of seven hundred fifty thousand dollars (\$750,000.00) in addition to the sum of one hundred sixty thousand one hundred fifteen dollars and forty-eight cents (\$160,115.48) claimed in the original petition herein.

NORTHERN PACIFIC RAILWAY
COMPANY.

By BRITTON AND GRAY,

Its Attorneys-in-Fact.

DISTRICT OF COLUMBIA, ss:

Before me, Chester R. Smith, a notary public in and for the District of Columbia, personally appeared Alexander Britton, to me known and known to me to be a member of the firm of Britton and Gray, attorneys-in-fact for the Northern Pacific Railway Company, and made oath before me that the allegations of said petition
42 are true to the best of his knowledge, information, and belief.

ALEXANDER BRITTON.

Subscribed and sworn to before me this 28th day of June, A. D. 1917.

[SEAL]

CHESTER R. SMITH,
Notary Public.

[Endorsed:] In the Court of Claims of the United States. The Northern Pacific Railway Company vs. The United States. No. 31,304. Supplemental Petition. Britton and Gray, Wilkins Building, Washington, D. C.

43

III. *General Traverse.*

Court of Claims.

No. 31,304.

NORTHERN PACIFIC RAILWAY COMPANY

VS.

THE UNITED STATES.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

44

IV. *Argument and Submission of Case.*

On January 21, 1918 the case was argued by Mr. Alexander Britton for the claimant.

On January 22, 1918 this and similar cases were argued by The Solicitor General, Mr. John W. Davis, and Assistant Attorney General, Mr. Huston Thompson, for the defendants.

On January 23, 1918 the argument was concluded by Mr. Britton, for the claimant, and the case was submitted.

45 V. *Findings of Fact, Conclusion of Law and Appendix.*
Filed March 11, 1918.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The plaintiff herein is a corporation organized and doing business under the laws of the State of Wisconsin, and does now and at all the times hereinafter stated did not operate a system of railroads extending from Ashland, Wis., and St. Paul, Minn., on the east, to Portland, Oreg., and Seattle, Wash., on the west, with certain branch lines and extensions from the main lines of said system, over all of which lines and branches plaintiff is now and at the times hereinafter stated was transporting the United States mail on routes designated by the Postmaster General, as follows:

Route No.	Termini.	From—	To—	Land-grant portion.
139067	Ashland-Sta. B. Superior, Wis.	July 1, 1907	June 30, 1917	Entire route.
141001	St. Paul, Minn.-Fargo, N. Dak.	.....do.....	.....do.....	St. Paul-University Switch (n. o.), Watab-Little Falls; Staples-Fargo.
141007	St. Paul-Duluth, Minn.	.....do.....	.....do.....	St. Paul-West End (n. o.)
141008	Stillwater-White Bear Lake, Minn.	.....do.....	.....do.....	Entire route.
141011	Superior, Wis.-Staples, Minn.	.....do.....	.....do.....	Sta. B. Superior-Staples, Minn.
141033	Wyoming-Taylor's Falls, Minn.	.....do.....	.....do.....	None.
141035	Duluth-Fond du Lac, Minn.	.....do.....	.....do.....	Duluth-West End (n. o.)
41036	Carlton-Cloquet, Minn.	.....do.....	.....do.....	None.
41042	Wadena Jet. (n. o.), Minn.-Wahpeton, N. Dak.	.....do.....	.....do.....	None.
41046	Brainerd-Morris, Minn.	.....do.....	.....do.....	Brainerd-Little Falls.
141051	Rush City, Minn.-Grantsburg, Wis.	.....do.....	.....do.....	None.
141061	Winnipeg Jet. (n. o.), Minn.-Grand Forks, N. Dak.	.....do.....	June 30, 1911	None.
141061	Manitoba Jet. (n. o.), Minn.-Grand Forks, N. Dak.	.....do.....	June 30, 1917	None.
161005	Fargo-Streeter, N. Dak.	July 1, 1910	.....do.....	None.
161006	Jamestown-Leeds, N. Dak.	.....do.....	.....do.....	None.
46				
161007	Sanborn-McHenry, N. Dak.	July 1, 1910	June 30, 1917	None.
161013	Fargo, N. Dak.-Miles City, Mont.	.....do.....	.....do.....	Entire route.
161016	Grand Forks-Femblina, N. Dak.	.....do.....	June 30, 1914	None.
161016	Grand Forks-Boundary Line (n. o.), N. Dak.	July 1, 1914	June 30, 1917	None.
161017	Wahpeton-Jamestown, N. Dak.	July 1, 1910	.....do.....	None.
161025	McKenzie-Linton, N. Dak.	.....do.....	.....do.....	None.
161030	Casselman-Morton, N. Dak.	.....do.....	.....do.....	None.
161036	Carrington-Turtle Lake, N. Dak.	.....do.....	.....do.....	None.
161041	Oberon-Esmond, N. Dak.	.....do.....	.....do.....	None.
163002	Logan-Butte, Mont.	.....do.....	.....do.....	None.
163003	Whitehall-Alder, Mont.	.....do.....	.....do.....	None.

163004	Drummond-Phillipsburg, Mont.	.....do.....	.....do.....	None.
163007	Clough Jct. (n. o.)-Marysville, Mont.	.....do.....	.....do.....	None.
163008	Missoula-Darby, Mont.	.....do.....	.....do.....	None.
163009	Butte-Garrison, Mont.	.....do.....	.....do.....	None.
163011	Laurel-Red Lodge, Mont.	.....do.....	June 30, 1914	None.
163011	Laurel Sta. (n. o.)-Red Lodge, Mont.	.....do.....	June 30, 1917	None.
163012	Livingston-Gardiner, Mont.	.....do.....	.....do.....	None.
163013	Silesia-Bridge, Mont.	.....do.....	.....do.....	Entire route.
163014	Hiles City, Mont.-Spokane, Wash.	.....do.....	.....do.....	None.
163017	Desmet Sta. (n. o.)-Mont.-Wallace, Idaho.	.....do.....	.....do.....	None.
163020	Sappington-Norris, Mont.	.....do.....	.....do.....	None.
163022	Harrison-Pony, Mont.	.....do.....	.....do.....	None.
170003	Wallace-Burke, Idaho	.....do.....	.....do.....	None.
170008	Marshall, Wash.-Lewiston, Idaho.	.....do.....	.....do.....	None.
170011	Arrow Sta. (n. o.)-Stites, Idaho.	.....do.....	.....do.....	Tacoma-Kalama, Wash.
171001	Tacoma, Wash.-Portland, Oreg.	.....do.....	June 30, 1914	None.
171005	Burnett-Wilkeson, Wash.	.....do.....	June 30, 1917	None.
171005	Spiketon-Wilkeson, Wash.	July 1, 1914	.....do.....	Spokane-Palmer, Jct.
171009	Spokane-Auburn, Wash.	July 1, 1910	.....do.....	(n. o.).
171012	Seattle-Tacoma, Wash.	.....do.....	.....do.....	Meeker Jct. (n. o.)-Tacoma.
171013	Pasco-Wallula, Wash.	.....do.....	.....do.....	Entire route.
171015	Pullman Jct. (n. o.)-Wash.-Geese, Idaho.	.....do.....	.....do.....	None.
171016	Junction (n. o.)-Fairfax, Wash.	.....do.....	.....do.....	None.
171018	North Bend-Black River Jct. (n. o.)-Wash.	.....do.....	.....do.....	None.
171019	Hartford-Robe, Wash.	.....do.....	June 30, 1914	None.
171020	Sumas-Seattle, Wash.	.....do.....	June 30, 1917	None.
171021	Cheney-Adrian, Wash.	.....do.....	.....do.....	None.
171025	Altalia-Dayton, Wash.	.....do.....	.....do.....	None.
171029	Centralia-Gate, Wash.	.....do.....	.....do.....	None.
171030	Kanaskat (n. o.)-Kerriston, Wash.	.....do.....	.....do.....	None.
171032	Lakeview-Hoquiam, Wash.	.....do.....	.....do.....	None.
171035	Cle Elum-Roslyn, Wash.	.....do.....	.....do.....	None.
171037	Chehalis-South Bend, Wash.	.....do.....	.....do.....	None.
171037	Chehalis Jct. (n. o.)-South Bend, Wash.	July 1, 1914	June 30, 1917	None.
171043	Arlington-Darlington, Wash.	July 1, 1910	.....do.....	None.

Route No.	Terminal.	From—	To—	Land-grant portion.
171044	Bellingham-Wickersham, Wash.	.....do.....	.....do.....	None.
171045	Vancouver Jct. (n. o.)-Yacolt, Wash.	.....do.....	.....do.....	None.
171053	Palmer Jct. (n. o.)-Meeker Jct. (n. o.), Wash.	.....do.....	.....do.....	Entire route.
171054	Hoquiam-Moellips, Wash.	.....do.....	.....do.....	None.
171062	Sunnyside Jct. (n. o.)-Grandview, Wash.	.....do.....	.....do.....	None.
171064	Coulee City Jct. (n. o.)-Coulee City, Wash.	.....do.....	.....do.....	None.
171070	Lewiston Jct. (n. o.)-Pasco, Wash.	.....do.....	.....do.....	None.
171070	Riparia-Alnsworth Jct. (n. o.), Wash.	July 1, 1914	June 30, 1914	None.
173016	Hunts Jct. (n. o.), Wash.-Pendleton, Oreg.	July 1, 1910	.....do.....	None.

Plaintiff is the successor of the Northern Pacific Railroad Co., a corporation created by the act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route," 13 Stats., p. 365, and as such successor became entitled to receive and enjoy the grants of right of way and of the public lands made by the aforesaid act of Congress, and subject to the rights, duties, and obligations thereby imposed, including the express agreement made in section 11 thereof:

"That the said Northern Pacific Railroad, or any part thereof, shall be a post route and a military road, subject to the use
47 of the United States, for postal, military, naval, and all other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation."

By reason of its ownership of other parts of the Northern Pacific Railway system plaintiff is further subject to the land-grant conditions expressed in the act of Congress approved May 5, 1864, 13 Stats., p. 64, entitled "An act to make a grant of lands to the State of Minnesota to aid in the construction of a railroad from St. Paul to Lake Superior," wherein, and among other considerations moving the United States in the making of said grant, it was provided:

"Sec. 7. And be it further enacted, That the United States mail shall be transported over said road, under the direction of the Post Office Department, at such price as Congress may by law direct: Provided, That until such price is fixed by law the Postmaster General shall have the power to determine the same."

By reason of its ownership of other parts of the Northern Pacific Railway system plaintiff is further subject to the land-grant conditions expressed in the act of Congress approved March 3, 1865, 13 Stats., p. 526, entitled "An act extending the time for the completion of certain land-grant railroad in the States of Minnesota and Iowa, and for other purposes," wherein, and among other considerations moving the United States in the making of said grant, it was provided:

"Sec. 8. And be it further enacted, That the United States mail shall be transported on said road, under the direction of the Post Office Department, at such price as Congress may by law provide: Provided, That until such price is fixed by law the Postmaster General shall have the power to fix the rate of compensation."

Plaintiff is also subject to the terms, conditions, and requirements of section 214 of the act of Congress of June 8, 1872, entitled "An act to review, consolidate, and amend the statutes relating to the Post Office Department," 17 Stats., page 309, which provides as follows:

"Sec. 214. That all railway companies to which the United States have furnished aid by grant of lands, right of way, or otherwise, shall carry mails at such prices as Congress may by law provide, and, until such price is fixed by law, the Postmaster General may fix the rate of compensation."

In the construction of the above lines of railroads the plaintiff's predecessor was aided by grant of lands made thereto by the United

States on those portions indicated in the foregoing table and was not aided by any grant of lands or other property made thereto by the United States on the other portions of said routes.

II.

In 1867 the mails were being conveyed under agreements made between the railroad companies and the Post Office Department in pursuance of the act of Congress of 1845, and were thereafter carried up to the time of the passage of the act of 1873 under similar agreements. At the latter date a large majority of the railroad postal routes carried the mails six days per week, so as to make six round trips per week, and did not carry mails on Sundays. A much smaller number of railroad postal routes carried mails one or more times each day in the week, so as to make not less than seven round trips per week, and these carried mails on Sundays.

After order No. 412 was promulgated and became effective, the service performed by plaintiff on the routes involved in its claim was on six days in the week on routes 139067, 141033, 141036, 141046, 141051, 161005, 161006, 161007, 161017, 161025, 161030, 161036, 161041, 163003, 163004, 163007, 163013, 163020, 163022, (171019, 3 t. a. w.), 171035, 171043, 171062, the annual rate of pay on which was \$74,732.34, and seven days in the week on routes 141001, 141007, 141008, 141011, 141035, 141042, 141061, 161013, 161016, 163002, 163008, 163009, 163011, 163012, 163014, 163017, 170003, 170008, 170011, 171001, 171005, 171009, 171012, 171013, 171015, 171016, 171018, 171020, 171021, 171025, 171029, 171030, 171032, 171037, 171044, 171045, 171053, 171054, 171064, 171070, and 173016, the annual rate of pay on which was \$851,710.28.

After the enactment of the act of 1873 the mails were continued to be carried over railroad postal routes under agreements between the Post Office Department and the railroad companies concerned, and were being so carried at the date of order No. 412, June 7, 1907. At the date of the above order the relative proportion of seven and six days' carriage of mails had changed, and over a majority of the railroad postal routes mails were being carried every day in the week. The relative aggregate pay therefor had also changed, and the railroad postal routes performing service every day in the week represented a great preponderance in miles of routes and pay for service over those performing six days in the week.

III.

For a long time previous to 1867 mails were carried by railroad companies under separate contracts between the respective companies and the Post Office Department under authority of the acts of Congress referred to by the Postmaster General in his report for 1867, namely, those approved July 7, 1838, 5 Stat., 283; January 25, 1839, 5 Stat., 314; and March 3, 1845, 5 Stat., 732. The last-named act provided that to insure, as far as may be practicable, an equal and

just rate of compensation, according to the service performed, among the several railroad companies in the United States for the transportation of the mail, it shall be the duty of the Postmaster General to arrange and divide the railroad routes, including those in which the service is partly by railroad and partly by steamboat, into three classes, according to the size of the mails, the speed with which they are conveyed, and the importance of the service; and it shall be lawful for him to contract for conveying the mail with any such railroad company either with or without advertising for such contract. Maximum rates were fixed for service by the three classes, respectively, and the Postmaster General was authorized, in case he should not be able to conclude a contract for carrying the mail on any of

49 such railroad routes at a compensation not exceeding the maximum rates or for what he might deem a reasonable and fair compensation for the service to be performed, to separate the letter mail from the residue of the mail and to contract, either with or without advertising, for conveying the letter mail over such route by horse, express, or otherwise at the greatest speed that can reasonably be obtained, and also to contract for carrying over such route the residue of the mail, in wagons or otherwise, at a slower rate of speed.

With reference to the ascertainment of the "size of the mails" in order to make the classification authorized by the last-named act, the above-mentioned report states as follows:

"In order to make such an arrangement and classification of railroad routes as the act last mentioned contemplates, there is an obvious necessity for accurate and reliable information as to the 'size of the mails' they severally convey. Yet, until recently, no measures were ever taken to procure from any considerable proportion of the roads in the service of the department statements of the amounts of mail matter conveyed by them, respectively. In February and March last, however, a 'railroad weight circular' (a copy of which is hereto annexed) was issued and addressed to the proprietors of each railroad route, requesting them to 'weigh all the through mails and way mails' conveyed in both directions to and from every station for thirty consecutive working days, commencing on all roads east of the Rocky Mountains on the 1st and on all roads west on the 15th of April, 1867, and report the results to the department in a prescribed tabular form annexed to the circular, and to return also a description of the accommodations provided for mails and agents, with the dimensions, fixtures, and furniture of the car or apartment allotted to their use, and a statement of the number of trips per week in each direction.

* * * * *

"No general systematic revision and readjustment of these rates, based upon the returns received, has yet been attempted, but in a number of cases of disagreement between the department and railroad companies the returns have been used as a guide to a proper settlement of the dispute; and, as the terms of existing contracts expire and it becomes necessary to enter into new engagements, it is expected that such changes will from time to time be made as will

eventuate ultimately in the nearest practicable approach to a perfect classification of railroad routes and graduation of their pay according to the comparative value and importance of the service they perform."

The result furnished data for each route respecting the whole weights of mails carried in each direction, the total weight and the average weight carried the whole distance for the 30 consecutive working days, and the average weight carried the whole distance per day, ascertained by dividing such average total weight by 30, the size of mail car or apartment, and the number of trips performed per week.

In the years 1868, 1869, 1870, 1871, and 1872 revisions and readjustments of the rates of pay on railroad routes were made under the terms of the law of 1845 according to classifications based upon the returns of the weight of the mails conveyed and the accommodations provided for the mails and the agents of the department, 50 ascertained in the manner above stated. (See Reports of Postmaster General, 1868, p. 10, Table E, pp. 66, 67; 1869, pp. 10, 11, Table F, pp. 86, 87; 1870, pp. 10, 11, Table E, pp. 82, 83; 1871, p. x, Table E, pp. 48, 49; 1872, pp. 10, 11, Table E, pp. 100, 101.)

In the reports of the Postmaster General for the years 1869, 1870, and 1871 he called attention to complaints on the part of railroad companies to the inadequacy of compensation for carrying the mails, and in his report of 1870 it was stated that many of them have refused and still refuse to enter into contracts with the department, alleging that they would not bind themselves by a permanent arrangement at the present prices, and that, as a consequence, on many of the important roads the mails were carried as suited the convenience of the companies.

In the revision and consolidation of the statutes relating to the Post Office Department in 1872, 17 Stat. L., 309, certain provisions of the law of 1845 were changed.

The following year Congress passed the act of March 3, 1873, 17 Stat. L., 558, which is set out in the appendix to these findings.

A part of the act of 1873 was embodied in Revised Statutes as section 4002.

Prior to July 1, 1876, the weighing was done by the railroad companies transporting the mails, as above set forth. Subsequent to that time, by virtue of an act of Congress approved March 3, 1875, the weighing was done by Government agents under the direction of the Postmaster General. (See Appendix.)

IV.

Subsequent to the act of 1873 the Postmaster General, for the purpose of putting said act into effect, adopted the division of the United States, theretofore made into four sections, and had the mails weighed and the annual compensation for a term of four years fixed for all railroad routes in one section each year.

Before the compensation was fixed for any route the Postmaster General secured from the company performing the service an agreement in the form following:

"The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad mail service."

After the weighing of the mails was completed and the compensation for the transportation thereof was fixed for the term the Postmaster General caused to be sent to each railroad company a notice in the form following:

"The compensation for the transportation of mails on route No. —, between — and —, has been fixed from July 1, 18—, to June 30, 18—, under act of March 3, 1873, upon returns showing the amount and character of the service for 30 successive working days, commencing —, 18—, at the rate of \$— per annum, being \$— per mile for — miles.

"This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week.

51 After the passage of said act of March 3, 1873, whereby the weighings were required to be made by employees of the department under instructions of the Postmaster General as above stated, the mails were weighed for 30 successive days, exclusive of Sundays, on routes not carrying mails on Sundays, and on 35 successive days, inclusive of Sundays, on routes carrying mails on Sundays, the Sunday weights being reported with the Monday weighings. The totals of the weighings in each class were used as a dividend, and in both classes 30 was used as a divisor. The quotient so obtained was treated as the average weight of mails per day carried.

From and after 1873 and until order No. 412 became effective, it was the practice of the Postmaster General, when computing the compensation payable to railroad carriers for service to be performed in transporting the mails over the several routes, to apply to the quotient obtained as above set forth, or by the act of 1905 which increased the minimum weighing days, the maximum rate allowed by statute, except in the cases of certain routes where pay was fixed without weighing, at the lowest maximum rate specified in the current law; "lap service" routes, being cases where two different routes coincide in part over the same line of railway and the pay is adjusted on a reduced sliding scale (P. L. & R., 1913, sec. 1325), "blue tag" routes over which periodical matter is transported in sacks marked with a blue tag, in fast freight trains, at less than maximum mail rates; and "equalization rates" where competition on basis of shorter mileage occurs between carriers, and the elder road possessed of the longer mileage and the mail contract is encouraged to retain the route, but at compensation based on the lesser mileage of the junior and shorter line.

V.

The acts of Congress approved July 12, 1876, and June 17, 1878 (see appendix), each prescribed reductions in the rates of pay to railroad companies for the transportation of the mails.

Said act of July 12, 1876, provided that land-grant roads shall receive only 80 per cent of the compensation authorized to be paid nonland-grant roads.

In administering the provisions of said acts of 1876 and 1878, and in making the reductions therein specified, the Postmaster General started with the maximum rates of pay allowed by the act of 1873, and the pro rata maxima prescribed by the regulations of the department for intermediate weights, and reduced the rates in accordance with said acts. The maximum rates taken in connection with the averages, found as stated, and the mileage involved, furnished the amount of the annual compensation.

VI.

In his report for the fiscal year ending June 30, 1884, the Postmaster General refers to the matter of "railroad rates," as embodied in the report of the Second Assistant Postmaster General, to which he called careful attention, and adds that "It is important that the rates paid should be arrived at by some equitable method." He says that in the 50 years intervening between 1834 and 1884 "legislation has touched this subject but four times"—in 1838, 1839, 1845, and 1873; that while the system of 1873 was an improvement on what went before, it was "still objectionable," "since it undertakes to pay for weight chiefly," and that the pay per ton per mile ranged from 8 to 96 cents. He recommended the passage of a proposed bill for the readjustment of compensation for the transportation of the mails on railroad routes.

Following this report, said bill was introduced in and favorably reported by the committees of both the House and Senate of the Forty-eighth Congress, but no action was taken on said bills by either House of Congress.

Subsequently the same bills were reintroduced in the Forty-ninth Congress, but no action was taken by the House on said bills.

In September, 1884, the then Postmaster General prepared and issued an order in the form following:

"Order No. 44.—Hereafter, when the weight of mails is taken on the railroad routes performing service seven days per week, the whole number of days the mails are weighed, whether thirty or thirty-five, shall be used as a divisor for obtaining the average weight per day."

Thereafter, October 22, 1884, the succeeding Postmaster General submitted the question to the Attorney General for his opinion as to whether the method adopted was a proper construction of the act of March 3, 1873, as follows:

"SIR: The act of March 3, 1873, 17 Stat. L., p. 558, regulating the pay for carrying the mails on railroad routes, provides:

"That the pay per mile per annum shall not exceed the following rates, namely:

"On routes carrying their whole length an average weight of mails per day of 200 pounds, \$50; 500 pounds, \$75; 1,000 pounds, \$100; 1,500 pounds, \$125; 2,000 pounds, \$150; 3,500 pounds, \$175, etc. * * *

"The average weight to be ascertained in every case by the actual weighing of the mails for such a number of successive working days, not less than thirty.' * * *

"Upon a large number of the railroad routes mails are carried on

six days each week—that is, no mail is carried on Sunday. On others they are carried on every day in the year.

"It has been the practice since 1873 in arriving at the average weight of mails per day on these classes of service to treat the 'successive working days' as being composed of six secular or working days in the week, which is explained in the following illustrations:

"Two routes, Nos. 1 and 2, over each of which 313 tons of mail are carried annually.

"On route No. 1 mails are carried twice daily, except Sunday, six days per week, and are weighed 30 successive working days, covering usually a period of 35 days. The result is divided by 30, and an average weight of mails per day of 2,000 is obtained.

Transportation per mile of road per annum.....	miles..	1,252
Weight per mile of road per annum.....	tons..	313
Pay per ton per mile of road per annum.....	cents..	47.92
Pay per mile run of road per annum.....	do...	11.09
Rate of pay allowed per mile per annum.....		\$150

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"On route No. 2 mails are carried twice daily, seven days per week and weighed for 30 successive working-days and for the intervening Sundays, the weight on the Sundays being treated as if carried on Mondays, the weighing as before covering usually a period of 35 days. The result is divided by 30 and an average weight of mails per day of 2,000 pounds is obtained.

Transportation per mile of road per annum.....	miles..	1,460
Weight per mile of road per annum.....	tons..	313
Pay per ton per mile of road per annum.....	cents..	47.92
Pay per mile run	do...	10.02
Rate of pay allowed per mile per annum.....		\$150

"I have thought it necessary to give the foregoing illustrations in order that the practice of this department under the law cited may readily appear, and I will thank you to advise me whether that practice is in compliance with or in violation of the statute.

"If not in conformity with the law, will you please indicate the correct method by which the average weight per day should be obtained and the compensation adjusted thereon?

"Very respectfully,

"FRANK HATTON,
"Postmaster General.

"Hon. B. H. Brewster, Attorney General, Department of Justice."

In reply, the Acting Attorney General gave his opinion as below:

DEPARTMENT OF JUSTICE,
"WASHINGTON, October 31, 1884.

"The Postmaster General.

SIR: I have considered your communication of the 22nd instant requesting to know whether the construction placed by the Post Office Department on section 4002, subsection 2, prescribing the mode in

which the average of the weight of mails transported on railroad routes shall be ascertained is correct, and am of the opinion that that construction is correct, and that a departure from it would defeat the intention of the law and cause no little embarrassment.

"I have the honor to be, your obedient servant,

"WM. A. MAURY,
"Acting Attorney General."

This order No. 44 was thereafter, in January, 1885, revoked, and no weighings having occurred in the meantime, it never had any practical operation or result.

VII.

What is called "A documentary history of the Railway Mail Service from its origin in 1834 to the present time," prepared by the general superintendent of the Railway Mail Service, was transmitted to the Senate with a letter by the Postmaster General on January 21, 1885, in compliance with a resolution of the Senate, and, among others, said document contains the following statements:

"Some little controversy at one time existed as to the justice of the present methods of obtaining the average daily weight to be taken as a basis for determining the annual pay, but a little examination made it clear that no other way of proceeding could be so just as that now in vogue.

* * * * *

"The present rule is on those roads carrying the mails six times a week to weigh the mails on 30 consecutive days on which the mails are carried, which would cover a period of 35 days; dividing the aggregate 30 weighings by 30 will give the daily average. On those roads carrying the mails seven times per week the weighing is done for 35 consecutive days (including Sundays) and the aggregate divided by 30 for a basis of pay.

"It is evident that the period during which the weighing is continued covers, in both cases, all the mails carried for 35 days. If, in the second case, we should take our basis from an average obtained by dividing the aggregate weight by 35 we should commit the absurdity of putting a premium upon inefficiency, for evidently if the Sunday train were cut off we should virtually have the same mails less frequently carried, and, therefore, with a higher daily average, and, therefore, a higher pay basis than in the case where the seventh train was run and the greater accommodation rendered.

"The present method gives no additional pay for the additional seventh train, but the other method would cause a reduction on account of better service, and practically would operate as a fine on all those roads carrying the mails daily and including Sundays."

Said document was printed as Senate Executive Document 40, Forty-eighth Congress, second session.

VIII.

The act of March 3, 1905, 33 Stat. L., 1088, changes the minimum weighing period provided by the act of 1873 so as to require the in-

clusion of at least 90 instead of at least 30 successive working days. (See Appendix.)

The post-office appropriation bill for the fiscal year ending June 30, 1906, as reported to the House of Representatives by its Committee on Post Offices and Post Roads, contained the following:

"For inland transportation by railroad routes * * * \$40,900,-000: Provided, That hereafter before making the readjustment of pay for the transportation of mails on railroad routes, the Postmaster General shall have the mails on such routes weighed and the average weight per day ascertained for a period of not less than three consecutive months."

Said proviso was stricken out in the House of Representatives and the following was adopted in lieu thereof and became a part of the act approved March 3, 1905:

"Provided, That hereafter before making the readjustment of pay for transportation of mails on railroad routes, the average weight shall be ascertained by actual weighing of the mails for such a number of successive working days, not less than ninety, at such times after June thirtieth, nineteen hundred and five, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct." Cong. Rec., 58th Cong., 3d sess., p. 1744.

In the administration of said act the Postmaster General made no change in the said system of weighing the mails theretofore adopted, except to weigh the mails for a period of 105 days instead of for a period of 35 days, and to use as a divisor 90 instead of 30 to ascertain the average weight, until the issuance of order No. 412, set forth in Finding X.

IX.

At the second session of the Fifty-ninth Congress the Committee on Postoffices and Post Roads of the House of Representatives reported a bill making appropriations for expenses of the Post Office Department for the fiscal year ending June 30, 1908, and the same became law on March 2, 1907. As reported by said committee said bill contained among other things, the following provision:

"Provided, That hereafter the average weight per day be ascertained, in every case, by the actual weighing of the mails for such a number of successive days, not less than one hundred and five, at such times and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

Said bill was accompanied by a report of said committee which fully explained the construction and practice, under said previous act of Congress, in the weighing of the mails, and that the purpose of said provision in the bill was to change the method of ascertaining the daily average weights by requiring that all of the days in the weighing period be included in the divisor. There was extensive debate upon said provision in the Committee of the Whole upon the state of the Union, in which the chairman of

said committee and other Members of the House stated and discussed the history, hereinbefore narrated, of the existing practice of including the secular days only in the divisor of weights.

Before action was had on said provision, a motion was made to amend the bill by inserting the following proviso, referring to the sum appropriated for the Railway Mail Service:

"Provided, That no part of this sum shall be expended in payment for transportation of the mails by railroad routes where the average weight of mails per day has been computed by the use of a divisor less than the whole number of days such mails have been weighed."

A point of order was made against this amendment on the ground that it changed existing law, and the chair sustained the point, observing:

"The existing law has received a construction by the officers charged with the duty of administering it, and that construction the chair feels bound to follow. The proposed amendment changes existing law as construed by the proper officer by changing the divisor. * * * It has been held further that while limitation may provide that a part of an appropriation shall not be used except in a certain way, yet the restriction of executive discretion may not go to the extent of new duties. And the limitation on the discretion exercised under the law by a bureau of the Government is a change of existing law."

56 Upon appeal from the decision of the chair, its ruling was sustained.

Another amendment was then offered, as follows:

Provided, That no part of this sum shall be expended in payment for transportation of the mails by railroad routes where the average weight of mails per day has been computed by the use of a divisor less than the whole number of working days such mails have been weighed; and

"Provided further, That the words 'working days' shall be construed to mean days upon which work in the transportation of the mails by railroad routes is performed."

This amendment was also rejected after debate, and said provision reported by the Committee on Post Offices and Post Roads was then stricken out. Thereafter an amendment was offered, as below, by the chairman of said committee, and was adopted by the House:

"The Postmaster General is hereby authorized and directed to readjust the compensation to be paid from and after the first day of July, nineteen hundred and seven, for the transportation of mail on railroad routes carrying their whole length an average weight of mail per day of upward of five thousand pounds by making the following changes in the present rates per mile per annum for the transportation of mail on such routes, and hereafter the rates on such routes shall be as follows:

"On routes carrying their whole length an average weight of mail per day of more than five thousand pounds and less than forty-eight thousand pounds the rate shall be five per centum less than the

present rates on all weight carried in excess of five thousand pounds, and on routes carrying their whole length an average weight of mail per day of more than forty-eight thousand pounds the rates shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds up to forty-eight thousand pounds; and for each additional two thousand pounds in excess of forty-eight thousand pounds at the rate of nineteen dollars and twenty-four cents upon all roads other than land-grant roads, and upon all land-grant roads the rate shall be seventeen dollars and ten cents for each two thousand pounds carried in excess of said forty-eight thousand pounds."

As so amended the bill was passed by the House and went to the Senate.

When it had been reported by the Senate Committee on Post Offices and Post Roads an amendment was offered in the identical language of said amendment first rejected by the House. Said amendment was not debated nor explained but was adopted by the Senate. The bill was then sent to a conference of the two Houses. In the conference objection was made on the part of the House of Representatives to said Senate amendment, and the committees of conference in their reports recommended that the Senate recede from the same, which it did, and the two Houses adopted said reports and passed the bill with said amendment stricken out, but containing the provision last above quoted.

57 When offering said provision in above form, and as it was enacted into law, the chairman of the Committee on Post Offices and Post Roads pointed out that the then pending bill had provided four distinct reductions (including the three carried in the provision hereinbefore set out) in the compensation of railway mail carriers, and he explained that two of said four reductions, viz, that carried by the amendment he was offering, and one other, relative to pay for Postoffice cars, had been selected as those which the House apparently preferred to adopt.

X.

Thereafter the Postmaster General on March 2, 1907, and June 7, 1907, respectively, issued orders as follows

"Order No. 165.—That when the weight of mail is taken on railroad routes the whole number of days the mails are weighed shall be used as a divisor for obtaining the average weight per day.

"Order N. 412.—Ordered, that Order 165, dated March 2, 1907, be, and the same is hereby, amended to read as follows:

"That when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day."

In accordance with the last-named order for all weighings and readjustments made subsequent to its promulgation, the Postmaster General weighed the mails on railroad routes for 105 days and divided the aggregate weights by 105, and the readjustments were

made on the average weight per day so computed, and the plaintiff company was paid accordingly.

Thereafter the Postmaster General submitted to the Attorney General the order No. 412 for an opinion as to its legality, and the Attorney General, under date of September 27, 1907, rendered an opinion sustaining the legality of said order.

XI.

The quadrennial term for which readjustment had been made on the routes of plaintiff numbered 139067, 141001, 141007, 141008, 141011, 141033, 141035, 141036, 141042, 141046, 141051, and 141061, operated on June 30, 1907, as set forth in Finding I, expired by limitation on that day. The Postmaster General on February 12, 1907, notified the plaintiff of direction given to weigh the mails on such routes. Accompanying said notice there was sent to the plaintiff a Post Office Department distance circular known as Form No. 2504, which it was requested to fill out with certain specific information called for thereon and to return the completed circular to the Second Assistant Postmaster General. As transmitted to the plaintiff the form contained an agreement clause to be executed by a principal officer of the company, as follows:

"The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad mail service."

58 The said notice accompanying the distance circular informed the plaintiff that the General Superintendent, Railway Mail Service, had been directed to weigh the mails on its routes commencing February 19, 1907, "for the purpose of obtaining data upon which the department may adjust the pay for mail service on the route (in accordance with the several acts of Congress governing the same), from July 1, 1907," etc.

Thereafter the plaintiff, on June 21, 1907, returned to the Second Assistant Postmaster General the executed distance circular with the agreement clause above noted signed, but with the following exception attached thereto:

"Exception taken to order No. 165, issued by the Postmaster General March 2, 1907, and order No. 412, issued June 7, 1907."

Accompanying said executed distance circulars was a letter dated June 18, 1907, which, after reciting the return of the distance circulars, read as follows:

"Without undertaking to materially change the form of the contract printed at the top of the second page of each circular and signed by our general manager, we have nevertheless taken the liberty of adding thereto a formal exception to both order No. 165, issued by the Postmaster General on March 2, 1907, and order No. 412, issued by the Postmaster General on June 7, 1907. The contract in question obligates our company 'to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad mail pay,' and we therefore beg leave to

now formally advise, in submitting these distance circulars, that the service involved is accepted, and our company agrees to perform same, with the proviso that by thus subscribing and delivering these circulars to the department our company does not agree to submit to any but lawful regulations by the department, and on this point our company does not concede the power of the Postmaster General, through an order or through any other act of the Post Office Department, to provide for changing the method of ascertaining the daily average weight of the mails carried over the routes named on the distance circulars herewith, unless authorized by proper congressional enactment. In the view of our company there is no authority whatever in existing legislation for the aforesaid orders Nos. 165 and 412, issued March 2, 1907, and June 7, 1907, respectively.

"The mails will be transported by our company, of course, as required by the public necessity, pending settlement of the rights of our company and of the United States in the question involved, i. e., the matter of ascertaining the average daily weights, with the consequent annual compensation for service performed over the routes covered by the distance circulars herewith. In addition to thus assuring the transportation of the mails as heretofore, by way of adequately fulfilling the public necessities, we now record our company's formal refusal to accept the proposed method of ascertaining the average daily weights of mails carried and fixing the annual rates of pay as provided by the orders of the Postmaster General heretofore described, and our company also reserves all of its rights in the premises to hereafter take such action as may be found requisite toward determining the legal method of ascertaining the daily average weights of mails carried over each route and
59 the correct and legal rates of compensation for the services so rendered, in accord with the existing legislation which controls the matters involved.

"We trust that appropriate adjustment in this connection may be effected without further material difficulty."

The Second Assistant Postmaster General addressed a letter to the plaintiff on October 3, 1907, as follows:

"This office is in receipt of the distance circular for route No. 141001, from St. Paul, Minn., to Fargo, N. Dak., filed by you for the term beginning July 1, 1907, and ending June 30, 1911, for railroad mail service by your company.

"Note is taken of the modification made by you in the agreement clause in which you except order No. 165, issued by the Postmaster General March 2, 1907, and order No. 412, issued by the Postmaster General June 7, 1907, and enter protest against other rules, regulations, or requirements of the department with respect to the performance of service. In regard to this, I have to advise you that the department will not enter into contract with any railroad company by which it may be excepted from the operation or effect of any postal law or regulation, and it must be understood that, in the performance of service, from the beginning of the contract term above named, and during the continuance of such performance of service, your company will be subject, as in the past, to all the postal

laws and regulations which are now or may become applicable during the term to this service."

Like notices and distance circulars bearing the same date for the other routes set forth in Finding I for the term of July 1, 1907, to June 30, 1911, were sent to the plaintiff by the Postmaster General, and the said distance circulars were returned executed by the plaintiff, as in the case for route 141001, and the same reply to the protest was made by the department in each case as above set forth.

The Postmaster General caused the mails to be weighed on each of said routes for 105 days, then caused the average daily weight carried thereon to be computed as provided in said order No. 412, and on the basis of the weight so ascertained caused the maximum statutory rate to be calculated; and thereafter he issued orders stating such amounts and rates as the compensation for the service. The order for route 141001 was as follows:

"Minn., St. Paul, Minn., & Fargo, N. Dak., 250.34 miles, 30.14 t. a. w., Northern Pacific Railway Company a. d. w. 45,700 lbs.

"From July 1, 1907, to June 30, 1911, pay the Northern Pacific Railway Company, quarterly, for the transportation of the mails between St. Paul, Minn., and Fargo, N. Dak., at the rate of \$129,430.87 per annum, being \$466.89 per mile for 10.44 miles St. Paul to Minneapolis, land grant; \$583.62 per mile for 73.77 miles, Minneapolis to Watab; \$466.89 per mile for 23.56 miles, Watab to Little Falls, land grant; \$583.62 per mile for 33.74 miles, Little Falls to Staples; \$466.89 per mile for 108.83 miles, residue, land grant, and for R. P. O. car service at the rate of \$25,346.92 per annum, being \$101.25 per mile for 250.34 miles, St. Paul to Fargo, for 1½ lines 60-ft., ½ √ line 50-ft., and 1 line 40-ft. cars.

"This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week."

The Second Assistant Postmaster General on November 19, 1907, sent to the plaintiff a notice of such readjustment of pay, as follows:

"The compensation for the transportation of mails, etc., on route No. 141001, between St. Paul, Minn., and Fargo, N. Dak., has been fixed from July 1, 1907, to June 30, 1911 (unless otherwise ordered), under acts of March 3, 1873, July 12, 1876, June 17, 1878, March 3, 1905, and March 2, 1907, upon returns showing the amount and character of the service for a number of successive working days, not less than 90, commencing February 20, 1907, at the rate of \$129,430.87 per annum, being \$466.89 per mile for 10.44 miles, St. Paul to Minneapolis, land grant; \$583.62 per mile for 73.77 miles, Minneapolis to Watab; \$466.89 per mile for 23.56 miles, Watab to Little Falls, land grant; \$583.62 per mile for 33.74 miles, Little Falls to Staples; \$466.89 per mile for 108.83 miles, residue, land grant, and pay is allowed for use of R. P. O. cars from July 1, 1907, to June 30, 1911, at the rate of \$25,346.92 per annum, being \$101.25 per mile for 250.34 miles, St. Paul to Fargo, for 1½ lines 60-ft., ½ line 50-ft., and 1 line 40-ft. cars.

"Subject to further readjustment in accordance with section 1272, P. L. & R., where lap service is involved and not so readjusted.

"This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week."

Before the term for which readjustment had been made on the above-named routes, as hereinabove set forth, had expired, the Second Assistant Postmaster General, on February 17, 1911, notified the plaintiff of direction given to weigh the mails on such routes and also sent distance circulars as theretofore for the purpose of making readjustments for the new term beginning July 1, 1911. Said notification was in the same language as that which had been given theretofore, with the exception that it included the following:

"In connection with the readjustment to be made on this weighing of the mails, your attention is called to the Postmaster General's Order No. 412, of June 7, 1907, which reads as follows:

"That when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day."

Before the contract term began the Second Assistant Postmaster General, on June 27, 1911, addressed a letter to plaintiff calling attention to the fact that the distance circulars had not been received for the new term, concluding with the following: "In the meantime the service will continue subject as in the past to the postal laws and regulations applicable thereto."

The plaintiff returned the distance circulars on July 5, 1911, with the agreement clause signed, but with the following exception attached thereto:

"but takes exception to order No. 412, issued by the Postmaster General, June 7, 1907."

Accompanying said distance circulars was a letter of same
61 date from plaintiff stating the return of the circulars and including the following statement:

"You will note that our vice president has signed these circulars to accept and perform mail service upon the conditions prescribed by the Postal Laws and Regulations, excepting that of order 412, issued by the Postmaster General June 7, 1907."

The Second Assistant Postmaster General on July 12, 1911, replied to the plaintiff as to this protest in the same language as was done in 1907, with the exception that in the statement that the company would be subject as in the past to all postal laws and regulations there was included "and orders of the Postmaster General."

Thereafter, on July 14, 1911, the plaintiff addressed a letter to the Second Assistant Postmaster General in reply as follows:

"In reply thereto, we call attention that the distance circulars referred to have been properly executed by Mr. J. M. Hannaford, second vice president and general manager of the Northern Pacific Railway Co., and constitutes a contract with the United States under which our company may be expected to perform the service, and transportation of mails over our lines must be in accordance with the terms stated in said circulars."

On July 15, 1911, the Second Assistant Postmaster General replied as follows:

* * * * *

"You state that the distance circulars have been properly executed by the second vice president and general manager of your company 'and constitutes a contract with the United States under which our company may be expected to perform the service, and transportation of mails over our lines must be in accordance with the terms stated in said circulars.' In reply to this I have to inform you that the filing of a distance circular with the agreement clause modified, as was done in this case, does not constitute a contract with the United States, and that notwithstanding your statement, you are again advised that the department will not enter into contract with any railroad company by which it may be excepted from the operation or effect of any postal law, regulation, or order of the Postmaster General. Respecting the terms under which the service on the route is being and will continue to be performed, it must be understood that your company will be subject, as in the past, to all the postal laws, regulations, and orders of the Postmaster General which are now or may become applicable during the term to this service."

On July 17, 1911, the plaintiff wrote the Second Assistant Postmaster General, acknowledging receipt of letter of July 15 and stated as follows:

"* * * You advise us that the filing of these distance circulars with the agreement clause modified 'does not constitute a contract between the United States and the carrier, and inasmuch as the distance circular filed by this company constitutes the only
62 contract to which it has assented, we would be pleased to receive your advice as to the conditions under which this mail is to be transported for the quadrennial period ending June 30, 1915, it being particularly understood that this company does not and will not consent to the transportation of the mail under order No. 412.

"It is perfectly true that this company is under obligation to transport mail over that portion of its road aided by a grant of land, subject to the Postal Laws and Regulations, but such law must not be confiscatory in its terms, and such regulations must at least be in accordance with law and not in contravention thereof. This company claims that order 412 was one beyond the power of the Postmaster General to make, and it does not care to enter into any contract for transportation of the mail for the quadrennial period ending June 30, 1915, except upon the distinct understanding that it does not agree to the terms of the order."

On July 19, 1911, the Second Assistant Postmaster General acknowledged receipt of plaintiff's letter and replied thereto as follows:

"Your objection appears to be directed entirely toward the use of what is known as the new divisor required to be used by the department by Postmaster General's Order No. 412 issued June 7, 1907.

The legality of this order has been formally passed upon by the Attorney General of the United States and sustained by him. The method of adjusting pay in accordance with it has since been the uniform practice of the department and has been applied to all weighings since its promulgation. It is therefore the settled practice of the department, to which no exception can be made.

"The position of the department, therefore, is that the compensation hereafter to be fixed by the adjustment orders in accordance with Order No. 412 is the maximum which may be allowed by the Postmaster General under the laws and regulations, and that for service performed since July 1 last and in the future the department can not allow a higher rate. The department, therefore, can not make any agreement with your company which will recognize the validity of your contention that Order No. 412 is without authority of law, and if your company performs the service under these conditions our position is that it can not recover more than the rate of compensation named in the adjustment orders, and that for service performed no other or further compensation will be paid."

Thereafter the mails were weighed, the average daily weight ascertained by the application of Order No. 412, the pay stated, and the plaintiff notified, as hereinbefore recited, for the preceding term.

Before the term for which readjustment on the routes hereinbefore mentioned had expired the Second Assistant Postmaster General on February 10, 1915, notified plaintiff in the same manner as he had done before of the purpose to weigh the mails and sent plaintiff the distance circulars to be executed and returned, as theretofore, for the term beginning July 1, 1915. Said notice of the weighing and the agreement clause on the distance circular were in the forms, respectively, used in 1911.

63 Plaintiff, on June 21, 1915, returned said distance circulars with the agreement clause signed, but with the addition of the following thereto:

"except Postmaster General's Order No. 412, issued June 7, 1907, and Postal Regulations, section 1317, paragraph 10. This company can not accept as full compensation payment based upon the daily average weight ascertained under aforesaid order and regulation and claims right to payment on the daily average volume of business ascertained under method provided by law in effect prior to the issuance of said order."

To this exception the Second Assistant Postmaster General, on June 28, 1915, replied, after acknowledging receipt of the circulars and noting plaintiff's modification, as follows:

"In regard to the modifications made by you in the distance circulars I have to inform you that, notwithstanding the same, the Post Office Department will not enter into contract with any railroad company by which it may be excepted from the operation or effect of any postal law, regulation, or order of the Postmaster General; and it must be understood that in the performance of service, from the beginning of the contract term above named and during the continuance of such

performance of service, your company will be subject, as in the past, to all the postal laws, regulations, and orders of the Postmaster General which are now or may become applicable during the term to this service; and that the amount of compensation for the transportation of the mails which will be fixed by the Postmaster General in accordance with the terms of paragraph 10, section 1317, Postal Laws and Regulations, 1913 (Order No. 412), is all the compensation that will be paid for such service on the routes named."

The mails were weighed, the average daily weights ascertained by the application of Order No. 412, the rates of pay stated therefor by the Postmaster General, and the plaintiff notified thereof, in the same manner as theretofore.

Thereafter on June 30, 1913, the Second Assistant Postmaster General sent plaintiff a letter as follows:

"At the time the notice of direction given to weigh the mails on your company's route No. 141001, from St. Paul, Minn., to Fargo, N. Dak., for the purpose of adjusting pay thereon was communicated to your company, you were informed of the intention of the department to apply Postmaster General's Order No. 412 in making such adjustment. In this connection you are informed that the compensation for carrying mails heretofore fixed, or which may be hereafter fixed by the orders of the Postmaster General on the above-named route, in which adjustment the said Order No. 412 has been or will be followed, is all that will be paid for the service on the route. Continuance of service by your company must only be with the understanding that such compensation as may be or which has been obtained by applying Order No. 412 shall be full payment for all services rendered by you."

64 The quadrennial term for which readjustments had been made on the routes of plaintiff operated on June 30, 1910, as set forth in finding I, expired by limitation on that day. The Postmaster General on February 4, 1910, notified the plaintiff of direction given to weigh the mails on such routes. Accompanying said notice there was sent to the plaintiff a Post Office Department distance circular, known as Form No. 3504, which it was requested to fill out with certain specific information called for thereon and to return the completed circular to the Second Assistant Postmaster General. As transmitted to the plaintiff the form contained an agreement clause to be executed by a principal officer of the company, as follows:

"The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad mail service."

Said notice accompanying the distance circular informed plaintiff that the General Superintendent, Railway Mail Service, had been directed to weigh the mails on its routes commencing February 17, 1910, "for the purpose of obtaining data upon which the department may adjust the pay for mail service on the route (in accordance with the several acts of Congress governing the same), from July 1, 1910," etc. It further contained the following statement in connection with the readjustment:

"In connection with the readjustment to be made on this weighing of the mails, your attention is called to the Postmaster General's Order No. 412 of June 7, 1907, which reads as follows:

"That when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day."

Before the contract term began the Second Assistant Postmaster General, on June 24, 1910, addressed a letter to plaintiff calling attention to the fact that distance circulars had not been received for the new term, concluding with the following: "In the meantime the service will continue subject, as in the past, to the postal laws and regulations applicable thereto."

Thereafter the plaintiff returned to the Second Assistant Postmaster General the executed distance circulars, accompanied by a letter of July 11, 1910, which were received at the department July 12, 1910, with the agreement clause above noted signed, but with the following exception noted thereto:

"Exception taken to order No. 165, issued by the Postmaster General March 2, 1907, and order No. 412, issued by the Postmaster General June 7, 1907."

The accompanying letter also referred to the protest.

The Second Assistant Postmaster General addressed a letter to plaintiff on July 29, 1910, replying to its protest. This letter, after acknowledging receipt of the distance circulars, is as follows:

"Note is taken of the modification made by your company in the agreement clause, in which it excepts order No. 165, issued by the Postmaster General March 2, 1907, and order No. 412, issued by the Postmaster General June 7, 1907. In regard to this I have to advise you that the department will not enter into contract with any railroad

65 company by which it may be excepted from the operation or effect of any postal law or regulation, and it must be understood that, in the performance of service, from the beginning of the contract term above named and during the continuance of such performance of service, your company will be subject, as in the past, to all the postal laws and regulations which are now or may become applicable during the term to this service."

Thereafter the mails were weighed, the average daily weights ascertained by the application of order No. 412, the pay stated by the Postmaster General, and the plaintiff notified thereof in the same manner as hereinbefore recited.

Before the term for which readjustment had been made on the routes last herein named had expired the Second Assistant Postmaster General, on February 9, 1914, notified the plaintiff of direction given to weigh the mails on such routes and also sent distance circulars as theretofore for the purpose of making readjustments for the new term beginning July 1, 1914. Said notification and distance circulars were in the same language as those which had been sent theretofore.

Thereafter plaintiff returned the distance circulars, which were received at the department June 29, 1914, accompanied by a letter dated June 26, 1914, with the agreement clause signed, but prefixed with the following:

"Exception to Postmaster General's Order No. 412, issued June 7, 1907, and Postal Regulations, section 1317, paragraph 10.

"This company can not accept as full compensation payment based

upon daily average weights ascertained under aforesaid order and regulations and claims right to payment on the daily average volume of business ascertained under method provided by law in effect prior to the issuance of said order."

The Second Assistant Postmaster General, on July 29, 1914, replied to the plaintiff as to this protest. After acknowledging receipt of the distance circulars and noting the exception, it continued as follows:

"In regard to the modifications made by you I have to inform you that, notwithstanding the same, the Post Office Department will not enter into contract with any railroad company by which it may be excepted from the operation or effect of any postal law, regulation, or order of the Postmaster General; and it must be understood that in the performance of service, from the beginning of the contract term above named and during the continuance of such performance of service, your company will be subject, as in the past, to all the postal laws, regulations, and orders of the Postmaster General which are now or may become applicable during the term to this service; and that the amount of compensation for the transportation of the mails which will be fixed by the Postmaster General in accordance with the terms of order 412 is all the compensation that will be paid for such service on the routes named."

Thereafter the mails were weighed, the average daily weights ascertained by the application of Order No. 412, the pay stated by the Postmaster General, and the plaintiff notified as hereinbefore recited for the preceding term.

66

XII.

The plaintiff continued to carry the mails of the United States from and after the 1st day of July, 1907, 1910, 1911, 1914, and 1915, on its respective routes which it was operating on those dates, as hereinbefore set forth, and has been paid for the service at the rates of compensation stated by such orders.

XIII.

The act making appropriations for the service of the Post Office Department for the fiscal year ended June 30, 1909, as reported to the House by the committee, contained no reference to the matter of weighings of the mails or to the question of the divisor. While in the Committee of the Whole an amendment was offered providing in effect that not exceeding six-sevenths of the amount payable under the orders adjusting pay in the two contract sections to which order 412 had not been applied should be paid out of the appropriation thereby made until such adjustment should have been made in accordance with order 412, or until it should have been finally determined by law that the first or then existing adjustment was binding upon the Government, notwithstanding any error or wrong in the basis of such ascertainsments. A point of order was raised on this in the House, and the Chairman of the Committee of the Whole overruled it, and the amendment was agreed to. The bill with the amendment was passed by the House and sent to the Senate. It was reported

from the Senate Committee on Post Offices and Post Roads to the Senate with a substitute amendment for the one passed by the House, which substitute amendment, among other things, provided that the whole number of days included in the weighing period shall be used as a divisor for obtaining the average daily weight. A point of order was raised on this in the Senate, and the President of the Senate overruled it, and then the amendment was agreed to. The bill with the amendment was passed by the Senate. A slight change was made by the conferees of the Senate and the House, and their agreement was reported to their respective bodies. The House, however, refused to adopt the Senate amendment, and the Senate receded, and the provision failed of enactment. In the discussion of the bill in the Senate the active member of the committee, in explaining the bill, stated that the provision was intended to crystallize into law the requirement that seven days instead of six shall be used as the divisor in determining the amount due the railroad companies, and the chairman of the committee in the House declared that the provision "makes permanent law what is now known as the divisor. It is now but a department official order, subject to change or repeal by any subsequent official in control of the department. By making it permanent law we avoid that possibility."

In the annual reports for the fiscal year 1907 and following years the Post Office Department stated its estimates of expenses for transportation by railroad routes, which estimates were calculated upon the application of the new divisor in so far as the same had been applied from year to year. These reports reached Congress through the usual channels of transmission. The report for 1907
67 stated that the railroad companies were dissatisfied with the order and had modified their distance circulars by excepting to it. Congress made the appropriations as submitted by the department. The reports for 1910 and succeeding years further stated that the railroad companies protested against the use of the new divisor, and that suits had been filed calling into question its validity. In submitting its estimates for appropriations for the years mentioned the department prepared them upon the basis of the application of order 412 in so far as it had been applied from year to year, and Congress made appropriations based thereon.

XIV.

The plaintiff company has received monthly or quarterly payments, based upon said computation and readjustments, at or about the end of each month or quarter's service, and the payments were received without objection or protest of any kind.

XV.

If instead of using a divisor of 105, there had been used a divisor of 90, and to the average thus found the maximum rates allowed by law be applied, the difference between the amount so resulting and what has been paid plaintiff to June 30, 1917, is \$704,871.63.

XVI.

Reference is made to the several reports of the Postmasters General for the years 1867 to 1914, inclusive; to Preliminary Report and Hearings relative to Railway Mail Pay before Joint Committee of Congress January, 1913, to April, 1914, pages 987, 1023, 1024; also to the acts of Congress appearing in the appendix to these findings.

Conclusion of Law.

Upon the foregoing findings of fact, the court decides, as a conclusion of law, that plaintiff is not entitled to recover, and its petition is accordingly dismissed. (See Opinion and Concurring Opinions filed herewith in cases 31227, 32812, and 32852.)

68

Appendix.

Act of 1873.

The act of March 3, 1873, 17 Stat. L., 558, appropriates for the service of the Post Office Department "out of any moneys in the Treasury arising from the revenues of said department, in conformity to the act of July second, eighteen hundred and thirty-six" (5 Stats., 80), "For inland mail transportation, fourteen million eight hundred and forty thousand and twenty dollars," and makes appropriations for messengers, route agents, mail-route messengers, local agents, letter carriers, etc., and then follows:

"For increase of compensation for the transportation of mails on railroad routes upon the condition and at the rates hereinafter mentioned, five hundred thousand dollars, or so much thereof as may be necessary: Provided, That the Postmaster General be, and he is hereby, authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned, to wit, that the mails shall be conveyed with due frequency and speed; that sufficient and suitable room, fixtures, and furniture, in a car or apartment properly lighted and warmed, shall be provided for route agents to accompany and distribute the mails, and that the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars; five hundred pounds, seventy-five dollars; one thousand pounds, one hundred dollars; one thousand five hundred pounds, one hundred and twenty-five dollars; two thousand pounds, one hundred and fifty dollars; three thousand five hundred pounds, one hundred and seventy-five dollars; five thousand pounds, two hundred dollars, and twenty-five dollars additional for every additional two thousand pounds, the average weight to be ascertained in every case by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times, after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and

verified in such form and manner as the Postmaster General may direct: Provided also, That in case any railroad company now furnishing railway post-office cars shall refuse to provide such cars, such company shall not be entitled to any increase of compensation under any provision of this act: Provided further, That additional pay may be allowed for every line comprising a daily trip each way of railway post-office cars, at a rate not exceeding twenty-five dollars per mile per annum for cars forty feet in length; and thirty dollars per mile per annum for forty-five feet cars; and forty dollars per mile per annum for fifty feet cars; and fifty dollars per mile per annum for fifty-five feet to sixty feet cars: And provided also, That the

69 length of cars required for such post-office railway-car service shall be determined by the Post Office Department, and all such cars shall be properly fitted up, furnished, warmed, and lighted for the accommodation of clerks to accompany and distribute the mails: And provided further, That so much of section two hundred and sixty-five of the act approved June eighth, eighteen hundred and seventy-two, entitled 'An act to revise, consolidate, and amend the statutes relating to the Post Office Department,' as provides that 'the Postmaster General may allow any railroad company with whom he may contract for the carrying of the United States mail, and who furnish railway post-office cars for the transportation of the mail, such additional compensation beyond that now allowed by law as he may think fit, not exceeding, however, fifty per centum of the said rates,' be, and the same is hereby, repealed."

Act of 1875.

The act of March 3, 1875, 18 Stat. L., 341, appropriates \$17,548,000 for inland mail transportation.

"And out of the appropriation for inland mail transportation the Postmaster General is authorized hereafter to pay the expenses of taking the weights of mails on railroad routes, as provided by the act entitled 'An act making appropriations for the service of the Post Office Department for the year ending June thirtieth, eighteen hundred and seventy-four,' approved March third, eighteen hundred and seventy three; and he is hereby directed to have the mails weighed as often as now provided by law by the employees of the Post Office Department, and have the weights stated and verified to him by said employees under such instructions as he may consider just to the Post Office Department and the railroad companies."

Act of 1876.

The act of July 12, 1876, 19 Stats., 79, appropriates for inland mail transportation, separating other than railroad routes from the latter, and—

"For transportation by railroad one million one hundred thousand dollars: Provided, That the Postmaster General be, and he is hereby, authorized and directed to readjust the compensation to be paid from and after the first day of July, eighteen hundred and seventy-six, for transportation of mails on railroad routes by reducing the compensation to all railroad companies for the transportation of mails ten per

centum per annum from the rates fixed and allowed by the first section of an act entitled 'An act making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, eighteen hundred and seventy-four, and for other purposes,' approved March third, eighteen hundred and seventy-three, for the transportation of mails on the basis of the average weight. And the President of the United States is hereby authorized to appoint a commission of three skilled and competent persons, who shall examine into the subject of transportation of the mails by railroad companies, and report to Congress at the commencement of its next session such rules and regulations for such transportation and rates of compensation therefor as shall in their opinion be just and expedient, and enable the department to fulfill the required and necessary service for the public. And to defray the expense of said commission the sum of ten thousand dollars is hereby appropriated out of any money in the Treasury not otherwise appropriated."

Act of 1877.

By the act approved March 3, 1877, 19 Stats., 385, this commission was continued.

Act of 1878.

The act of June 17, 1878, 20 Stats., 142, appropriates—

"For transportation by railroad, nine million one hundred thousand dollars; * * * And provided further, That the Postmaster General be, and he is hereby, authorized and directed to readjust the compensation to be paid from and after the first day of July, eighteen hundred and seventy-eight, for transportation of mails on railroad routes by reducing the compensation to all railroad companies for the transportation of mails five per centum per annum from the rates for the transportation of mails, on the basis of the average weight fixed and allowed by the first section of an act entitled 'An act making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, eighteen hundred and seventy-seven, and for other purposes,' approved July twelfth, eighteen hundred and seventy-six."

Act of 1905.

The act of March 3, 1905, 33 Stats., 1088, appropriates for inland transportation by railroad routes \$40,900,000, of which \$120,000 may be employed for other purposes mentioned—

"Provided, That hereafter before making the readjustment of pay for transportation of mails on railroad routes, the average weight shall be ascertained by the actual weighing of the mails for such a number of successive working days not less than ninety, at such times after June thirtieth, nineteen hundred and five, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

Act of 1906.

The act of Congress approved June 26, 1906, 34 Stats., 467, 472, 473, appropriated \$43,000,000 for inland transportation by railroad routes for the fiscal year ending June 30, 1907, and provided:

"That the Postmaster General shall require all railroads carrying the mails under contract to comply with the terms of said contract as to time of arrival and departure of said mails, and it shall be his duty to impose and collect reasonable fines for delay, when such delay is not caused by unavoidable accidents or conditions."

Act of 1907.

The act of March 2, 1907, 34 Stats., 1212, appropriates—

"For inland transportation by railroad routes, forty-four million six hundred and sixty thousand dollars.

71 "The Postmaster General is hereby authorized and directed to readjust the compensation to be paid from and after the first day of July, nineteen hundred and seven, for the transportation of mail on railroad routes carrying their whole length an average weight of mails per day of upward of five thousand pounds by making the following changes in the present rates per mile per annum for the transportation of mail on such routes, and hereafter the rates on such routes shall be as follows: On routes carrying their whole length an average weight of mail per day of more than five thousand pounds and less than forty-eight thousand pounds the rate shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds; and on routes carrying their whole length an average weight of mail per day of more than forty-eight thousand pounds the rate shall be five per centum less than the present rate on all weight carried in excess of five thousand pounds up to forty-eight thousand pounds, and for each additional two thousand pounds in excess of forty-eight thousand pounds at the rate of nineteen dollars and twenty-four cents upon all roads other than land-grant roads, and upon all land-grant roads the rate shall be seventeen dollars and ten cents for each two thousand pounds carried in excess of said forty-eight thousand pounds."

VI. *Opinion of the Court by Campbell, Ch. J., Concurring Opinions by Booth, J., Barney, J., Downey, J., and Hay, J., Filed March 11, 1918.*

Nos. 31227, 31304, 32812, 32852.

(Decided March 11, 1918.)

KANSAS CITY, MEXICO AND ORIENT RAILWAY COMPANY OF TEXAS

v.

THE UNITED STATES.

THE NORTHERN PACIFIC RAILWAY COMPANY

v.

THE UNITED STATES.

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY

v.

THE UNITED STATES.

THE SEABOARD AIR LINE RAILWAY COMPANY

v.

THE UNITED STATES.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

These suits were brought to recover compensation for mail transportation alleged to be due the parties respectively, and have been heard together. A large number of similar cases were taken upon submission when these were heard. The questions involved are substantially the same as those in *Chicago & Alton R. R. Co.*, 49 C. Cls., 463, and *Yazoo & Mississippi Valley R. R. Co.*, 50 C. Cls., 15. The two latter cases were appealed to the Supreme Court, where they were affirmed by an equally divided court. That ruling is not an authority for the determination of other cases. *Hertz v. Woodman*, 218 U. S., 205. It does not follow, however, that the decisions of this court must be ignored by the court itself when similar cases are again presented. The court should have some regard for its own decisions, and in class cases where though the plaintiffs can not appeal or where the defendants do not appeal the court adheres to its ruling and refuses to reconsider cases subsequently presented that are governed by the former decisions. These considerations could very well justify the court's disposition of the instant cases without an opinion. The plaintiffs, however, are entitled to findings of fact because the amounts claimed are sufficient to authorize appeals. It was therefore decided to hear the parties again in argument, and certain typical cases have been prepared with the view to presenting all of the ques-

tions that it is supposed can arise in these so-called divisor cases. The plaintiffs' attorneys have accordingly been heard in extended oral argument and they have filed able and extensive briefs. They have probably left nothing unsaid that would tend either to elucidate the questions involved or to show the right of plaintiffs to recover.

73 As we adhere to the conclusion that the petitions should be dismissed, we will deal more at length with the cases than would be done by the mere announcement of a conclusion of law. There are some differences in the cases, but we think they can all be disposed of in one opinion.

These suits were brought in the years 1911, 1912, 1913, and 1914, respectively. In some of them objection was made to Order 412 hereafter mentioned; in some of them no objection to the order was made. To each of the objections reply was made by the Postmaster General to the effect that no contract would be made which excluded a full observance of the rules and regulations, and at that time Order 412 had been promulgated. The respective adjustment notices which later followed had not been issued; all of the plaintiffs received and transported the mails and were paid therefor periodically according to the terms of Order 412 and the readjustment notices issued by the Postmaster General and without objection or protest when payments were accepted.

The objections or exceptions to Order 412 were general. There was no separate objection based upon a supposed injustice to 6-day routes. The contracts were with the different plaintiffs who operated both classes of routes and contracted for both alike.

The claims may be classified as being (1) claims of what are called 6-day routes, (2) claims of 7-day routes, (3) claims of a railroad on parts of whose line are routes affected by the land-grant act.

An illustration of the claims asserted by some 7-day routes under a supposed implied contract may be taken from a typical route as follows: The mails were actually weighed on the route for 105 days, which included 15 Sundays. The total of the 105 weighings (making the dividend) was divided by 105, and the daily average weight was found to be 143,314 pounds. The maximum statutory rates were applied, and the annual compensation was ascertained to be \$305,253.67. This sum was paid in monthly installments, which, as they severally matured, were received by the carrier without objection of any kind.

If instead of using 105 as the divisor 90 had been used, the daily average weight would have been 167,199 instead of 143,314 as actually found.

Assuming that the actual average weight found by 105 as the divisor fairly represented the actual weight carried each day throughout the year, it would appear that on said route there was actually transported during the year of 365 days something over fifty-two million (52,000,000) pounds of mail, whereas if 90 had been used as the divisor the carrier would have been credited with transporting during the year about sixty-one million pounds, making a difference between what was thus actually carried and what by the use of the divisor 90 would appear to have been carried of about nine million pounds of mail. If the basis adopted was 313 days per year the dif-

ference in the weights under like computations would be approximately seven and a half million pounds. The difference between what the carrier was paid and what it would have received if its compensation had been based upon the result of using 90 as the
 74 divisor and the maximum rate would have been about \$46,000 per year. This amount for each of the years in suit is claimed. The actual weight of the mails carried during the year is not shown except by taking the actual average weight per day found as above and multiplying it by 313 or 365 days. The actual weight can not be approximated otherwise.

The action is based upon contract, and plaintiff, denying there was an express contract, relies upon implied contract for recovery as upon quantum meruit. It has been paid the maximum rates provided by law for the average weight of mails actually carried. Can it recover under an implied contract as upon quantum meruit for the nine million pounds of mail which it did not in fact carry and thereby receive \$46,000 per year additional to what it has received?

A contention advanced, however, by plaintiffs is that the law required the use of a "divisor of 90."

Two propositions may be regarded as settled:

(1) That the railroad companies were until the act of July 1916, free to accept or refuse the terms proposed by the Postmaster General for the transportation of mails. Thus it was held in *Alabama Great Southern Railroad case*, 25 C. Cls., 30, 41, decided in 1889, in an opinion by Judge Nott, that railroads other than land-grant roads "are under no obligation to the Government to carry the mail and may decline the service if they will, but that if they do perform, it must be upon the terms and conditions prescribed by the statutes and regulations of the Post Office Department or under an express contract within the limitations imposed by law." This case was affirmed by the Supreme Court, 142 U. S., 615.

In *Eastern Railroad Company*, 129 U. S., 391, 395, it is said:

"After the first of July, 1877, the company was under no legal obligation to carry the mails. * * * We do not mean that the railroad company was bound to continue the carrying of the mails, if subsequent changes in the rates were unreasonable or did not meet with its assent. On the contrary, it was at liberty, when the five per cent reduction was made, to discontinue their transportation on its cars."

In *Chicago, Milwaukee & St. Paul Railway Company*, 198 U. S., 385, 389, it is said:

"A contract may not be forced upon a railway. It may accept, however, and become bound by the action of the Post Office Department."

To the same effect is *Minneapolis & St. Louis Railway Company*, 24 C. Cls., 350, and *Texas & Pacific Railway Company*, 28 C. Cls., 379.

In *L. & N. Railroad Company*, 46 C. Cls., 267, 277, it was declared that the Post Office Department had no authority to compel the company to transport the mail upon terms to which it had not agreed. *Delaware, L. & W. Case*, 51 C. Cls., 426.

(2) The rates stated in the statutes were maximum rates.

After the amendatory acts of 1876 and 1878 herein mentioned were passed a suit was brought in this court involving the construc-

tion of said acts, and in the opinion delivered by Judge Richardson (Eastern Railroad Company Case, 20 C. Cls., 23, 41) it was said:

“Section 4002 of the Revised Statutes, from the act of 1873, does not establish an absolute rate of compensation, necessarily
75 alike to all railroads, for mail transportation, but fixes maximums which are not to be exceeded, leaving the Postmaster General a discretion to make contracts at less rates if he should be able to do so. On that point the language of the section is clear—‘the pay per mile shall not exceed the following rates.’ It is urged that this language is controlled by the preceding words of the section, ‘The Postmaster General is authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned.’ In our opinion the rates there referred to are any rates which the Postmaster General may contract for, not exceeding those therein after mentioned.”

This case was decided January 12, 1885, and upon appeal was affirmed by the Supreme Court February 4, 1889, 129 U. S., 391, 395. In the Supreme Court's opinion, delivered by Mr. Justice Harlan, it is said:

“After the first of July, 1877, the company was under no legal obligation to carry the mails. It carried them after that date under an implied contract that it should receive such compensation as was reasonable, not exceeding the maximum rates prescribed by Congress, and subject to a readjustment of rates as required by the act of 1876.”

Again, in 1889, this court, speaking through Chief Justice Richardson, in *Minn. & St. L. Ry. Co. Case*, 24 C. Cls., 350, said (p. 361):

“In the *Eastern Railroad Case* (20 C. Cls., R. 41), affirmed on appeal (129 U. S., 391), we held that the statute (Rev. Stat., § 4002) did not fix the exact amount to be allowed to railroads, but only the maximum which the Postmaster General could not exceed, leaving to him a discretion to make contracts in his own way at less rates if he should be able to do so.”

And again, in 1893, in the *Texas & Pac. Ry. Co. Case*, 28 C. Cls., 379, it was said (p. 389):

“It seems to be assumed by the claimant that the statutes fix an absolute rate of compensation, while in point of fact they fix only the maximum below which the Postmaster General is authorized to make such contracts as he deems the needs of the mail service may justify.”

In *A. G. S. R. R. Co. case*, 25 C. Cls., 30, 43, decided in 1889, this court, speaking through Judge Nott, and with reference to the portions of a railroad that were land-aided, said:

“But as to these latter portions of the road it was unquestionably within the power of Congress to set a limitation upon the price which should be paid for such service, and thereby to leave the public agent, the Postmaster General, without authority to bind the defendants for any greater price, either by entering into an express contract or by accepting the claimant's services without one; and it was equally within the discretion of Congress to fix different rates for different roads or classes of roads, and in so doing to say that if part of a mail carrier's line was a land-grant road the remainder of the line

should be restricted to the same compensation. Such a restriction would not bind the carrier to carry the mail, but it would bind the Postmaster General not to incur a greater liability, and would be notice to the road at what point his authority to bind the Government by contract terminated."

76 In Jacksonville, Pensacola & Mobile R. R. Co. case, 21 C. Cls., 155, decided in 1886, and affirmed by the Supreme Court (118 U. S., 626), it is recognized that the rates mentioned in the statute are maximum rates.

In A. T. & S. F. Ry. Co. case, 225 U. S., 640, the court construed a provision of the act of March 2, 1907, 34 Stats., 1212, which provides additional pay for railway post-office cars "at a rate not exceeding" designated sums for different lengths of cars. That act was an amendment of section 4004 Revised Statutes in that it changed the maximum rate stated and made some change with reference to the sizes of the cars mentioned in the earlier act. The terms "at a rate not exceeding" are the same in both acts, and section 4004 is in the same language as the second proviso in the act of 1873. The Supreme Court held "The statute defined a car line, but did not fix the compensation. It left that to be determined by the Postmaster General, who could have named any rate not to exceed the statutory maximum." If the language of said proviso to the act of 1873 only fixed a maximum rate, it is difficult to see how the language in the same statute that the pay per mile per annum "shall not exceed the following rates" is to be given a different meaning.

That the rates were "specified maximum rates" was recognized by the Supreme Court as early as 1881 in Chicago & N. W. Ry. Co., 104 U. S., 680, 683. That they were maximum rates is declared by Revised Statutes, section 3999, providing for the contingency that the Postmaster General may not be able to contract within the prescribed maximum rates.

We think it is too late to question the rule stated.

First. It is said in one of the briefs for plaintiffs, speaking of the act of March 3, 1873, 17 Stats., 558, that it "plays the most important part in this case." But that act is not to be considered independently of the balance of the law when we come to construe its meaning.

The act of June 8, 1872, 17 Stats., 283, entitled "An Act to revise, consolidate, and amend the Statutes relating to the Post Office Department," deals comprehensively, as its title imports, with the powers, duties, and responsibilities of that department. It was referred to in the opinion of this court in the Chicago & Alton case and we now mention some of its provisions with more particularity. It contains more than 300 sections and embodies the statutory law relating to the Post Office Department, with perhaps a minor exception not material here. By its repealing clause (sec. 327) it repeals "the following acts and parts of acts and resolutions and parts of resolutions," and there follows a list of the acts and resolutions wholly or partly repealed, beginning with section 2 of the act of March 3, 1791, and concluding with the act of April 27, 1872. Included in the repealed statutes are the act of July 2, 1836, 5 Stat., 800, the two acts of March 3, 1845, 5 Stats., 732, 748, and section 8 of the act of March 3, 1845, 5 Stats., 752. It provides for the estab-

lishment of "a department to be known as the Post Office Department," the principal officers of which "shall be one Postmaster General and three Assistant Postmasters General," to be appointed by the President, by and with the consent of the Senate. The term of office of the Postmaster General is "for and during the term of the President by whom he is appointed, and for one month thereafter, unless sooner removed."

After prescribing in particular some of the duties of the Postmaster General, the act of 1872 provides (sec. 6) that he shall generally superintend the business of the department and execute all laws relating to the postal service.

By section 388 of the Revised Statutes of 1873 it is provided "That there shall be at the seat of government an executive department to be known as the Post Office Department, and a Postmaster General, who shall be the head thereof."

Among other provisions of the act of 1872 the following appear:

Section 46. "That the money required for the postal service in each year shall be appropriated by law out of the revenues of the service."

Section 210. "That the Postmaster General shall arrange the railway routes on which the mail is carried" * * * "into three classes, according to the size of the mails, the speed at which they are carried, and the frequency and importance of the service, so that each railway company shall receive, as far as practicable, a proportionate and just rate of compensation, according to the service performed." This differs from its predecessor, the act of 1845, in the order of terms and in the introduction of the word "frequency," which did not appear in the act of 1845.

Section 211 provides the maximum pay for the several classes of routes "per mile per annum."

Section 212. "That if the Postmaster General is unable to contract for carrying the mail on any railway route at a compensation not exceeding the maximum rates herein provided, or for what he may deem a reasonable and fair compensation," he may make other arrangements for carrying the mails.

Section 213. "That every railway company carrying the mail shall carry on any train which may run over its road, and without extra charge therefor, all mailable matter directed to be carried thereon, with the person in charge of the same."

Section 214 provides that all railway companies which have been aided by a grant of land or otherwise "shall carry the mail at such prices as Congress may by law provide; and, until such price is fixed by law, the Postmaster General may fix the rate of compensation."

Section 256. "That no contract for carrying the mail shall be made for a longer term than four years, and no contract for carrying the mail on the sea shall be made for a longer term than two years."

Section 265 authorizes the Postmaster General to enter into contracts for carrying the mails with railway companies without advertising for bids therefor, and further authorizes him to allow any railway company "with whom he may contract for the carrying of the United States mail, and who furnish railway post-office cars for the transportation of the mail, such additional compensation beyond

that now allowed by law as he may think fit, not exceeding, however, fifty per centum of the said rates."

Section 200. "That all the waters of the United States shall be post roads during the time the mail is carried thereon."

Section 201 provides "That all railways and parts of railways which are now or hereafter may be put in operation are hereby declared to be post roads"; and by sections 202 and 203 canals and plank roads during the time the mail is carried thereon are declared to be post roads.

All of these sections were carried into the revision of 1873 and constitute sections 3997 et seq. and section 3964 and sections 3942 and 3956 of the Revised Statutes, the latter authorizing contracts with railway companies without advertising for bids and declaring that no contract for carrying the mails shall be made for a longer term than four years.

Provision is made (sec. 212, act of 1872; sec. 3999, Rev. Stats.) for the contingency that the Postmaster General may be unable to contract for the carrying of the mail on any railway route at a compensation "not exceeding the maximum rates herein provided, or for what he may deem a reasonable and fair compensation," and he is authorized to contract with others for the service upon the happening of such a contingency. It is manifest that this section, being an authority to a public officer to contract with the railway companies within the maximum rates fixed by the act, "or for what he may deem a fair and reasonable compensation," was something more than a mere authority conferred on him, because the words just quoted are sufficient, when addressed to a public officer, to impose upon him the duty of exercising his judgment as to the reasonableness and fairness of the compensation which he proposes to pay.

It is not necessary when inquiring into the powers and functions of the Postmaster General under such an act as that of 1872 or the revision of 1873 to find expression in explicit terms of all his rights and powers and duties. An applicable rule in such case, stated in one of the plaintiff's briefs and in the Government's brief as well, is as follows:

"A practical knowledge of the action of any one of the great departments of the government, must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done, that can neither be anticipated nor defined and which are essential to the proper action of the government. Hence, of necessity, usages have been established in every department of the government which have become a kind of common law, and regulate the rights

and duties of those who act within their respective limits. And no change of such usages can have a retrospective effect, but must be limited to the future." *United States v. Macdaniel*, 7 Pet., 1, 14.

Aside from that rule it is plainly deducible from the terms of the statute that there was devolved upon the Postmaster General the duty of contracting with railway companies on terms within maximum rates and that it required of him the exercise of a broad discretion in matters pertaining to the transportation of the mails. In

79 theory at least the expenses of handling the mails by the department were to be borne by its revenues. *Rev. Stat.*, sec.

4054. These were to be covered into the Treasury and the expenses were appropriated for by Congress out of such revenues. From the earliest period the carrying of the mails was under contract, and the act of 1872 made no change in that regard except in the case of land-aided roads. Their duty to transport the mails arose from the statutes granting them aid.

When therefore we come to consider the meaning of the act of March 3, 1873, we must treat it not as a separate and distinct piece of legislation but in connection with the law then upon the statute book, of which, when enacted, it became only a part. By its enactment some material changes in the existing law were made, and those are to be ascertained from a proper consideration of the entire law. Repeals by implication are never favored. Where there is inconsistency between the provisions of the new law and those of the old effect should be given to both if it reasonably may be, and unless there be a positive repugnancy the old law is only repealed by implication pro tanto to the extent of the repugnancy. *Wood's case*, 16 Pet., 342, 363; *Tynen's case*, 11 Wall., 88, 93.

Some significance attaches to the fact that the Congress enacted in the revision of 1873 so many of the provisions of the act of 1872 and incorporated therein at the same time the act of 1873, and to the further fact that those provisions have continued as part of the law. The act of July, 1916, 39 Stats., 425, marked a distinct departure from prior law.

As already stated, the revision of 1873 made the Postmaster General "the head of an executive department," thereby enlarging the first section of the act of 1872. It also by section 4003 made an important change in the proviso from which that section is taken in the act of 1873. The latter act provided that "in case any railway company now furnishing railway post-office cars shall refuse to provide such cars such company shall not be entitled to any increase of compensation under any provision of this act," while section 4003 forbids any increase of compensation under the provisions of "the next section," which provides an increase for the use of the cars. These provisions are in the law because of the adoption of the revision of 1873.

The authority and duty of the Postmaster General to make contracts with railway companies, the provision that no contract for carrying the mails shall be made for a longer term than four years," the right of the Postmaster General to discontinue service on any postal route, the classification of railway routes and the maximum pay therefor, the duty of the Postmaster General to make contracts

with others where he can not contract within the maximum rates provided by the statute or "for what he may deem a reasonable and fair compensation," and other provisions of the act of 1872, have been continued as a part of the statutory law along with the act of 1873.

The act of 1845 had directed that the Postmaster General arrange and divide the railroad routes into three classes according to the size of the mails, the speed with which they were to be conveyed, and the importance of the service, while section 210 of the act of 1872 (sec. 3997 Rev. Stats.) provided for arranging the railway routes into three classes according to the size of the mails, the speed at which they are carried, and the "frequency and importance of the service," so that all railway companies shall receive, as far as practicable, a proportionate and just rate of compensation, according to the service performed. The "equal and just" rate of compensation mentioned in the act of 1845 gives way to just and proportionate rate in the act of 1872.

The act of 1873 appropriates for an increase of compensation, and provides that the Postmaster General readjust the compensation to be paid for the transportation of the mails on railroad routes "upon the conditions and at the rates hereinafter mentioned," said conditions being, first, that the mails shall be carried with due frequency and speed and that a suitable car be provided, and, second, "that the pay per mile per annum shall not exceed the following rates." (Sec. 4002, Rev. Stats.).

Due frequency and speed and the furnishing of certain cars were conditions, and what should be due frequency and speed, and what the character of the cars, were left largely in the first instance to the determination of the Postmaster General, but being "conditions" it is clearly implied that the matter should be consummated by an agreement of the parties.

Whether in putting in operation the act of 1873 the Postmaster General could have continued to classify the routes into three classes as provided by section 3997 of the Revised Statutes we need not stop to inquire. The authority to do so having been continued, it cannot be positively affirmed that the act of 1873 prevents it. It certainly can not be affirmed that the act of 1873 is inconsistent with all of the provisions of section 210 of the act of 1872 (sec. 3997, Rev. Stats.), which, as stated, still stands upon the statute book as declaring the purpose that some distinctions be made "so that each railway company shall receive, as far as practicable, a proportionate and just rate of compensation, according to the service performed." The observance of that purpose necessarily involved the exercise of judgment and discretion by the Postmaster General. Nor is there any doubt that the Postmaster General when he first came to apply the act of 1873 made a distinction between at least two general classes of railroad routes, namely, those carrying mails six and seven days, respectively, having regard to the speed and frequency with which they were carrying the mails as well as to the character of the service performed. The law vested in him full discretion to do that, and the right and duty to exercise that discretion necessarily

continued in the office of the Postmaster General. The discretion being vested by statute its exercise by one or more officials could not prevent its exercise by a succeeding one. Macdaniel's case, 7 Pet. 1, 14.

Nor did the act of 1873 repeal section 212 of the act of 1872 (sec. 3999, Rev. Stats.), which imposed a duty on the Postmaster General to contract for the transportation of the mails for a compensation within the maximum rates allowed by law or for less than the maximum rates if his judgment dictated that a reasonable and fair compensation would be less than the maximum. The act of 1872 had provided certain maximum rates to be paid "per mile per annum" and the act of 1873 declared that the "pay per mile per annum shall not exceed the following rates."

We are told that some years prior to 1873 the question of classification of the railroad routes with reference to "the size of the mails" and the other provisions of the law had been a matter of
 81 difficult application and that the Postmaster General had originated a plan by which he called upon the railroad companies to furnish statements of the weights of the mails being carried, and to that end they were asked to weigh the mails for 30 consecutive working days. This they did in many instances, but at times they failed to do so. They weighed the mails being carried on 6-day routes for the 30 days during which they were carried, and they weighed the mails on the 7-day routes during a period of 35 days. In both instances they reported as the average the totals divided by 30. These returns were made the basis of adjustments by the Postmaster General where differences arose in the matter of settlements.

The importance of a change whereby the indefinite term "size" of the mails and other features requiring his judgment would be put in more definite form was called by the Postmaster General to the attention of Congress. We are told that the act of 1873 originated in his office and was intended to effectuate the plan he had conceived for making weight rather than size the basis of compensation. If it was intended to give concrete expression to a requirement that the mails should be weighed in the cases of the two classes of roads for 30 and 35 days, respectively, and the dividend in both cases be divided by 30, the language of the act falls short of making it so. It calls for an average and indicated the number of weighings, and hence literally the divisor is the number of weighings and the dividend is their sum. It limited the number of weighings to not less than 30 and left for the determination of the Postmaster General the number of successive working days on which the mails were to be weighed. It required weighings at least once in four years and left it for the Postmaster General to determine whether they should be conducted oftener. The times when they should be made and their frequency were not fixed by the act. If the act was a departure from the classification contemplated in the prior law, it did not prescribe in terms what differences should be made between routes performing different service. It was known to Congress that some

routes were carrying the mails for 7 days a week, some for 6 days a week, and others for a less time. The relative proportion of 7-day routes to 6-day routes was about one to seven.

While making frequency and speed conditions upon which contracts would be made, the act did not in terms withdraw the injunction in section 210 of the act of 1872 (3997, Rev. Stats.) that contained the legislative expression of the reason and purpose of classifying the railway routes, and its proper observance rested in the discretion of the Postmaster General.

While section 210 of the act of 1872 provided maximum rates for three classes, the act of 1873 provided a graduated scale of maximum rates based upon average weight. It left, however, the adjustment of rates to intermediate weights in the hands of the Postmaster General.

Many features in the act of 1873 rest for their practical operation in the judgment and discretion of the Postmaster General. Some of these are stated in *Chicago & Alton* case, p. 507, and others are found in other parts of the law.

When the Postmaster General came to apply the law he found that the mails were being transported by different railroads for different numbers of days per week, some for 7 days, others for 82 6, and yet others for fewer days. The indicated purpose of the law relating to classification was that the different roads should receive, as far as practicable, a just and proportionate compensation, according to the service performed, and due frequency and speed were conditions entering into the contemplated readjustments. The rates mentioned were limited to designated standards, and the intermediate weights falling between these standards could only be compensated for upon schedules left to the Postmaster General to adjust.

As to those intermediate weights he had discretion, because he could prescribe greater or less rates within the stated standards by making the proportion greater for the smaller intermediate weights than for the larger ones, or he could do the reverse.

The term "weight" had superseded the term "size" in the prior law, but actual weight could not be had without constant weighings, which were impracticable. The average weight carried became therefore the basis upon which the Postmaster General could contract if the railroad companies would agree. An actual average of 30 different weighings would not in the very nature of things show the actual weight transported because it changed (generally increasing) during the year, and the disparity became greater in proportion to the length of the contract term. The weighings were not confined to a given number of days but were to be for not less than a stated number.

The policy of Congress, as indicated by its general legislation on the subject, had been to leave the handling of the business in the Postmaster General's hands under such limitations as they saw fit to prescribe. His duties and his authority (sec. 6, act of 1872) were in a general way defined, among them being that he should "generally superintend the business of the department." In the revision

of 1873 the department appears as one of the executive departments, and the Postmaster General is made the head of it. That the affairs of the Post Office Department bear more analogy to a large business enterprise than to a function of Government is apparent. That in the conduct of it much is and must be necessarily left to the judgment and discretion of its superintendent is also apparent. When, therefore, he found that the act of 1873 provided for an average weight of mail, according to which compensation was to be readjusted and under which contracts for their transportation should be made, was the law under which he was to act mandatory or directory merely? By directory provision it is meant that they are to be considered as giving directions which ought to be followed, but not as so limiting the power in respect to which the directions are given that it can not effectually be exercised without observing them. *Hubbert v. Lumber Co.*, 191 U. S., 70, 76; *De Visser case*, 10 Fed. 642, 648.

Whether an act is directory depends upon the sound construction of its nature and object and of public convenience and apparent legislative intention. If it be merely directory, a deviation from it may subject the official to responsibility to the Government, but can not be taken advantage of by third parties. *Bank v. Dandridge*, 12 Wheat., 64, 81.

In *Martin's case*, 94 U. S., 400, the court held that the eight-hour law of 1868 was a mere direction by the Government to its agent, and did not affect the right of contract. This court has said in effect

83 in an opinion by Judge Barney that the act was merely directory. *New York, N. H. & H. case*. When the daily average was found by either method it was not controlling upon the roads because they could refuse to contract or transport the mails at all. If the act was mandatory a mathematical average would result and the proposed terms could be adjusted within the maximum rate provided the carriers agreed. If the law was directory or permissive a method to be found by the Postmaster General could be adjusted to actual conditions. If he assumed that the rates were fixed or could be enlarged, he was plainly in error, because the courts have held otherwise. If the act was mandatory it marked a departure from the policy of Congress as regards the conduct of this great business enterprise. It had directed a classification to be made so that "as far as practicable" just and proportionate compensation could be made, according to the service performed.

That the act was directory seems to have been the view adopted by the Postmasters General in the early stages of its application, because the defense of the usage in 1885 was based upon the justice of the practice then in vogue and not upon the absolute requirements of the law. Nor could they plainly read into the language of the act of 1873 a requirement that the mails be weighed 35 days and divided by 30. Speaking as it did of a number of weighings, not less than 30, and using the word "average," a literal application of the terms would call for a dividend made up of the sum of the terms in the divisor, and therefore for an actual average; but treating it

as directory would authorize what may be called a permissive average deemed just to the Government and the railroads.

It was materially supplemented in that regard by the act of 1875. By treating it as directory the long-continued usage of the department and the recognition thereof in the repeated appropriations by Congress can be supported. Being directory, it was left to the judgment of the Postmaster General, under such instructions as he considered just to both parties, to ascertain the daily average weight by some other than a mathematical rule. The power was not to be arbitrarily or capriciously exercised, and ample protection against that kind of action could be found in the right of the railroad companies to decline to accept the average as found by refusing to transport the mails or in the course suggested in *Jacksonville R. R.*, 118 U. S., 626, 628. And see *Martin's case*, 94 U. S., 400. It is clear that if the law permitted him to adopt a course of action which to him seemed just the original adoption of it or the continuance of the usage could not take away or limit the right, duty, or powers of his successors to act independently when in their wise discretion changed conditions seemed to warrant a change in the usage. Charged with the same or similar duties and responsibilities, his successors were vested with the same powers he had. Usage alone would not make it mandatory, and, except that a change in the usage would not be allowed to affect the rights acquired under a previous usage, its alteration can not be prevented by parties whose claims arise after full notice of the change. *Macdaniel's Case*, 7 Pet., 1; *Alabama Great Southern R. R. Case*, 142 U. S., 615.

When the Postmaster General came to apply the law he called upon the railroad companies, who were then conducting the weighings, to report the weights to him in accordance with the plan he had originated. The practice followed was to weigh the mail on 6-day routes for 30 days and on 7-day routes for 35 days. The Sunday weights on the 7-day routes were reported as part of the Monday weighings. The totals in both cases were divided by 30 and the quotients were accepted as the average daily weight. This daily average weight on the 6-day routes was thus an actual average, and that on the 7-day routes may be called a permissive average. Very generally the maximum rates prescribed by the statute and by the schedule of rates applicable to intermediate rates as formulated by the Postmaster General were applied to the daily average thus ascertained. If the law required an actual average in all cases it is plain that by the method adopted the 7-day routes were credited with more average weight of mail than they carried, and were therefore paid more than an actual average of their weights would have justified within the maximum rates prescribed by law, a course that can be justified only upon the assumption that the average to be ascertained under the law was not an actual average, but such an average as having regard to the other provisions of the law, the Postmaster General might adopt. That Congress was informed of the method adopted, and by repeated appropriations to meet deficiencies and appropriations based upon these estimates, which in turn were based upon said method, may well be taken as

admitting that the Postmaster General's action was satisfactory to them. They appear to have been equally satisfied with the results of Order 412. They did not change it.

Within less than two years after the act of 1873 went into effect, the act of March 3, 1875 (18 Stats., 341), was passed. That act, we may assume, also originated in the Post Office Department. It provided for a change in the conduct of the weighings and required them to be made by employees of the Department. It carries a provision which we think is of importance in this connection. The prior act had required that the result of the weighings by railroads "be stated and verified in such form and manner as the Postmaster General may direct," while the later act directed that the Postmaster General "have the weights stated and verified to him by said employees *under such instructions as he may consider just to the Post Office Department and the railroad companies.*" [Italics ours.] We do not think that the full force of this expression is found in the suggestion that it merely authorized him to devise some just plan "for obtaining the gross weights," because it is to be assumed that he would have done that anyway. The studied phraseology of the act indicates a broader purpose. It mentions "such instructions as he may consider just to the Post Office Department and the railroad companies" with reference to having the weights stated and verified to him. The Postmaster General by the plan adopted had credited the 7-day routes with possibly one-sixth more than the actual average weight being transported. That he supposed he had the authority may be assumed from the fact that he so exercised it. And it is conceivable, at least, that he would desire a more concrete expression of legislative authority to continue the practice. Chicago & Alton Case, page 516. The act of 1875 may be accepted as authorizing instructions such as were given, whereby the Sunday weights were reported with the Monday weighings. The authority to give such instruction as he might consider just necessarily involved the exercise of judgment and discretion. We see no reason why in the terms of the act of 1875 may not be found an escape from the literalism of the act of 1873, if it is not found in other provisions of the law, because we find that as late as 1884 the Postmaster General, in submitting the question to the Attorney General and stating the method of ascertaining the average weights, said: "The weight on the Sundays being treated as if carried on Mondays." Such, then, were his instructions, because he considered that course just to the Government and the railroads. But that is not to say that the method pursued was mandatory upon the Postmaster General. The fact that he could give instructions involved the right to determine what the instructions should be, and what would be "just" was for his determination. The determination of it at one time, or by one or more Postmasters General, did not affect the right of others to give other instructions and to find that another course was just. The weighings every four years or oftener required, as they occurred, an observance by the then Postmaster General of the injunctions of the law.

The acts of 1876 and 1878 directed a reduction in the rates, and

they were accordingly applied. It was under these acts that the cases arose wherein this court determined that the rates mentioned were maximum rates. They did not affect or establish the divisor.

No further legislation occurred affecting the questions until the act of 1905, which provided that the mails should be weighed for not less than 90 successive working days. Except for the change from 30 to 90 the act of 1905 uses the language of the act of 1873. If literalism be indulged, the language would seem to indicate a change rather than a confirmation of an existing method, but we think the correct view is that Congress still left the direction of the Postmaster General unimpaired. That law did not make permanent or obligatory any divisor.

The next act was that of March 2, 1907, which changed the rates with reference to roads carrying upward of 5,000 pounds of average weight of mails per day. That act did not affect the method of ascertaining the average. Its requirements are met when, to the average ascertained according to a directory statute, the proper rates were applied, the railroads having still the right to refuse to contract at all.

On June 7, 1907, the Postmaster General issued Order 412, which provides "That when the weight of mails is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day." No attempt to apply this rule to existing contracts was made. The rule was intended to be and was applied prospectively in the several contract sections as the quadrennial weighings occurred. We do not find that this rule is subject to the objections which the plaintiffs have urged against it.

Turning now to the contentions of the plaintiffs:

(a) That the railroads were by statute declared to be post roads. No significance attaches to that fact in these cases.

The same statutes declare that canals and plank roads shall be post roads. It has been correctly stated that the establishment by law of all railroads as post roads means nothing more than 86 that the mails could and might be carried over such railroads as over the ordinary public highways, and the mere fact of making such declaration did not, even by implication, indicate that the United States could or would undertake, without the consent of the railroad companies and without making compensation therefor, require any railroad company to transport the mails over its lines. *Atlantic & Pacific Telegraph Co.*, 2 Fed. Cases, 632; *State of Pennsylvania v. Wheeling*, 18 How., 421, 441. Post roads and post routes are not synonymous terms. *Blackham v. Gresham*, 16 Fed. Rep., 609, 611; Congress declares what are post roads, and it requires action by the Postmaster General to authorize railway postal routes.

(b) That what is called the long-continued departmental construction of the act of 1873 is controlling.

It was stated in the *Chicago & Alton* case, page 492, that in the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law and were appointed to carry its provisions into effect is entitled to great

respect, and ought not to be overruled without cogent reasons and may be accepted as determining its meaning. By accepting the view above stated, that the law was directory, and not mandatory with reference to the ascertainment of the average weights, we can find support for the departmental usage that was so long continued. If, on the other hand, the act was mandatory and literal it was not pursued correctly. "It will not be contended that one Secretary has not the same power as another to give a construction to an act which relates to the business of the department. And no case could better illustrate the propriety and justice of this rule than the one now under consideration." Macdaniel's case, 7 Pet., 1, 14. Such is the rule where the change is made prospective and is not given a retroactive operation. The claims asserted here arose after the Postmaster General had changed the order, and they are in no sense rights vested or accruing under a former construction or usage of the department. The distinction is illustrated by Macdaniel's case, where an employee of the Navy Department was held entitled to certain compensation, because he had rendered services under a construction which obtained during the time of the service. He was not claiming under the changed construction, but his rights arose during what might be called the erroneous construction. The distinction is also noted in Alabama Great Southern Railroad Co. case, 142 U. S., 615, 620, where the general rule contended for by plaintiffs is stated, and it is said that the courts will look with disfavor upon any sudden change whereby parties "who have contracted with the Government upon the faith of such construction may be prejudiced"; and it stated further: "It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive, and to require from him the payment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the Government." The construction or usage "must be considered binding on past transactions." Macdaniel's case, *supra*, page 15.

In *Midwest Oil Co. case*, 236 U. S., 459, the Supreme Court, three justices dissenting, held that the long-continued practice by the Chief Executive of withdrawing public lands sustained the right to do it in the particular case, though there had been no statute authorizing it. Referring to the cases of continued practical construction it was said, page 473: "These decisions do not, of course, mean that private rights could be created by an officer withdrawing for a railroad more than had been authorized by Congress in the land-grant act." "Nor do these decisions mean that the Executive can by his course of action create a power." The court held that a long-continued exercise of the authority was sufficient to sustain action after it had been taken as against parties whose rights arose thereafter, but it was not held that the rule was mandatory and could not be departed from. Nor indeed can it be stated that the rule is so general as to be applicable in all cases involving departmental action because a principle inhering in our system is that it is a government of laws. It would be a strange conclusion to reach

that departmental usages founded on its own construction of the statute can not be changed by the same authority which gave them birth. The Congress may enact a law which they can amend or repeal; the courts may construe a statute and modify or overrule their decisions. Is the executive branch alone so hampered that it may not modify or change the construction or the usage or practice or methods it may have adopted when such modification or change is given a prospective and not a retroactive operation and when the claims are asserted did not arise until after the usage is changed, and particularly when the usage originated in the exercise of a directory authority?

(c). It is, however, further contended by plaintiffs that their view does not rest solely upon departmental construction, but that it is also sustained by the effect to be given to the passage of the act of 1905 as well as of the acts of 1876 and 1878. Particular stress is laid upon the acts of 1905 and of 1907.

Exception is taken in one of the briefs to the statement in the Chicago & Alton case (p. 512) that "it is evident that Congress was not satisfied with the average weights being obtained, whether the dissatisfaction arose from the method or the result, and they therefore changed the law to insure a more satisfactory average." It can not be denied that under the terms of the act of 1873 the Postmaster General could have weighed the mails for 90 days, more or less, because that act called for weighings for "not less than 30 successive working days." When, therefore, we find a direction in the later act that they shall be weighed hereafter for not less than 90 successive working days, it must be concluded that Congress had a purpose in making the change. If satisfied with the results under the prior law, why enact the later one? If the exception be to the use of the word "method" in that connection it may be conceded that it was not essential to the thought conveyed. It was in effect, if not in words, held that the act of 1905 was not a legislative adoption of the prevailing method for ascertaining the daily average weight and if Congress did not have that method in mind it would seem that the act had no bearing on the question of a fixed divisor one way or the other, since there is nothing in its language to show that they had. Our view of the meaning of the act of 1905 is that it did not affect the powers of the Postmaster General in any regard, whether such powers were statutory or discretionary, mandatory or directory, except to require weighings for not less than 90 successive working days. We might upon that point accept the statement found on different briefs as follows: "This act changed neither the rates nor the basis of pay, but contains the same provision with reference to said basis as that embodied in the act of 1873;" or

That the act "means the same thing in every particular that the act of 1873 meant, whatever that was"; or

That "it lengthened the period for demonstration by weighing but made no change in the elements to be considered nor in the manner of their use or combination"; or

"This act of 1905 did nothing more than make the weighing period include 90 instead of 30 working days."

If, on the other hand, its purpose was to require "a longer period of weighing by which to get, as was supposed, a fairer average of weights," it certainly authorized the official charged with that duty to adopt a method which would accomplish the desired result. The fact that when the act was upon its passage in the House the chairman of the committee changed the language of the bill as reported so that "there could be no question of the construction that can be made of the law" merely confirms the view that the act was not intended to change the law except as to the number of weighings. In fairness it should be stated that the plaintiffs did not by the expressions quoted intend to concede our interpretation of the act of 1873, but they can not find in its terms a positive mandate to pursue the course adopted by the department, and they must have recourse to what is termed the long-continued departmental construction or legislative adoption thereof. Their contention leads to the conclusion that the Postmaster General gave an authoritative and final construction of the statute. This, we think, is beyond his power. The statute does not confer the power of legislation, nor can the exercise of the power have the effect of legislation. *United Verde Copper Co.*, 196 U. S., 207, 215. Every statute, to some extent, requires construction by the public officer whose duties may be defined therein. He must read the law and must, therefore, in a certain sense construe it in order to form a judgment from its language what duty he is directed to perform. *Robert's case*, 176 U. S., 221, 231. There is, however, a distinction between acts involving the exercise of judgment or discretion and those which are purely ministerial. With respect to the former the courts are without power to control executive discretion, but with respect to ministerial duties an act or refusal to act is or may become the subject of review by the courts. *Noble v. Union River Logging Co.*, 147 U. S., 165, 171. We think the course pursued was a matter of usage or practice rather than of construction and finds its support in whatever discretion the act of 1873 vested the Postmaster General with, taken in connection with other provisions of law, supplemented by the act of 1875 authorizing such instruction as the Postmaster General deemed proper. It appears that in "a documentary history of the railway history from its origin, in 1834," which was transmitted to Congress in 1885 by the Postmaster General it was stated that while there had been some little controversy at one time "as to the justness of the present method" of obtaining the daily average weights a little examination would show that "no other way of proceeding could be so just as that now in vogue." Thus it was because he and his predecessors thought that the method was just to the railroads and the Government that he adopted the usage. Proceeding to state that method it is explained in the history that on the 6-day routes the sum of 30 weighings are divided by 30 and "give the daily average," while on the 7-day routes the "weighing is done for 35 successive days (including Sundays) and the aggregate divided by 30 for a basis of pay." Why a succeeding Postmaster Gen-

eral could not with equal right adopt a method of finding an actual average on 7-day routes and dividing the aggregate of 90 days weighings on 6-day routes for a basis of pay is not made entirely clear, when it be assumed that in his wise discretion he decided that the new method was just to the department and the railroad companies and had a proper regard for the purposes of the law.

In the hearing before a congressional joint committee in 1914, it is shown that in 1873 there were 684 six-day routes and only 97 seven-day routes. The aggregate mileage of the first class was then approximately 48,000 miles and of the latter 15,000 miles. The annual pay to the six-day routes was approximately four and three-quarters millions and to the seven-day routes it was approximately two and a half millions of dollars. Charged with the duty mentioned the Postmaster General found the daily average weights, as has been stated, and his action was followed until 1907. When he came to consider the situation in 1907 he found, instead of 684 six-day routes as in 1873, that they had increased to about 1,394 in number, with an aggregate mileage of about 49,000 miles, while the seven-day routes had increased in number from 97 in 1873 to about 1,600 in 1907, with an aggregate mileage of 153,000 miles. While, therefore, the six-day routes about doubled in number in the 34 years the seven-day routes had increased by about 16 times their number during the same period.

From receiving somewhat more than a third of the whole compensation paid for mail transportation by railroads in 1873 to both classes, the seven-day routes were being paid in 1907 about thirteen times as much as the aggregate of the six-day routes. That is, the six-day routes were being paid approximately three and a quarter millions of dollars per annum in 1907, and the seven-day routes were receiving over forty-one millions of dollars.

Assuming that the weights carried bore some proper relation to the pay received it would thus appear that the seven-day routes (which carried so much smaller aggregate weight in 1873 than six-day routes) were transporting in 1907 many times more weight than the six-day routes were transporting.

The relative positions of the two classes had changed in 1907, as has been shown. The greater mileage and the greater weights appeared on the seven-day routes.

When the Postmaster General laid out his course in 1873, he adopted as a basis for the actual average the six-day routes, they being the more in number and carrying the greater weights. He or some of his immediate successors adopted the same divisor for the seven-day routes "as a basis for pay."

If by the act of 1905 there was to be a longer period of weighing by which to get, as was supposed, a fairer average of weights, and only one divisor was to be used, it can not be reasonably affirmed that a fairer average is not attained when, considering all the 90 routes, the basis is laid upon the class which is greatest in number and handles the larger weights.

We are told in one of the briefs that the readjustments of compensation were made upon the basis of "six round trips per week,"

and it is hence stated that "Sunday service never was and is not now within the contract and could be discontinued at any time without a reduction of compensation."

If such be the case, does it tend to support the claim that they be credited each day with an increased average? The theory was that as the seven-day routes carried mail more frequently than others, their daily average should not be actual, and it was increased by the method used. If they voluntarily transported the mails on Sunday, they can not recover for the service; and if they do not contract to do so, why may not the Postmaster General, under such instructions as he may consider just to the parties and within the terms of the law, find the actual average and accordingly agree to pay for what the carrier does contract to carry.

We do not mean to imply that the provision as to six round trips per week means what the plaintiffs suggest. The postal laws and regulations provide for deductions for failure to perform trips, and it is probable that the failure to transport the mails as agreed is visited with fines and deductions. The act of 1906 requires as much.

But the contention is that the divisor became fixed by the passage of the act of 1905 because, it is urged, "that the enactment by Congress without change of a statute which had previously received long continued executive construction is an adoption by Congress of such construction."

The rule stated is found in the *Hermanos* case, 209 U. S., 337, 339, is rested upon the *Falk* case, 204 U. S., 143, and is repeated in the *Komeda* case, 215 U. S., 329, 396. These cases are mentioned in the *Chicago & Alton* case. In referring to the *Hermanos* case it was said that the opinion stated that the contention of the Government that the paragraph under consideration separated distilled wines in bottles into three classes and fixed a specific rate of duty on each and that (1) the court thought the contention was right and needed no comment to make it clear; further, that counsel for the Government "also pointed out" that the tariff act of 1875 and subsequent acts were substantially similar to the paragraph under consideration and that Treasury decisions were in accordance with the interpretation for which the Government contended, and, therefore, it was said, (2) "We have stated that when the meaning of a statute is doubtful great weight should be given to the construction placed upon it by the department charged with its execution," citing *Robertson v. Downey*, and another case, and (3) the rule above quoted is then stated. It was to this third proposition, in its nature distinct from the other two mentioned, that the *Falk* case is cited. Two of the justices concur "solely because of the prior administrative construction," from which we infer that they did not agree that the first contention of the Government was right and needed no comment to make it clear and hence concurred solely upon another ground, the statement relative to which was in the second proposition, above stated. We repeat these observations not because they are essential to the conclusion we reach but as tracing the history of the rule.

The decisions of the Supreme Court are controlling in this court and their statement that a rule had been announced is authoritative. It is not for us to question the accuracy of

their statement, but when called upon to apply a stated rule we must consider the facts of the case to which the rule is sought to be applied, and we may refer to the conditions under which the rule was announced, because the rule is applicable where similar conditions present themselves. In the cases mentioned the court was considering tariff legislation; and, as is well known, the proper application of tariff provisions frequently calls for construction of the law under which those charged with its execution may proceed and the rights of importers become fixed. Their construction does not involve a discretion to do one or another thing, but does involve a positive duty to execute the law. Men direct their business and import their goods in reliance upon an adopted construction. Provision is made for hearings in tariff matters, where an interpretation of the act may be had, and the Treasury decisions are reported. It may be that the statement of the rule is not to be limited by the character of the cases in which it was announced, but we do not think it was meant that in all cases where a statute uncertain in terms is reenacted without change the court must ascertain from the department charged with its execution the construction which that department put upon the prior act. The court is not absolutely bound to give, but may give, the departmental construction a controlling effect. *Chicago & Alton case*, page 492. And where a given rule is invoked we may have regard to the reason for it, because, generally speaking, the reason ceasing, the rule itself need not be applied.

We do not think it necessary, however, in these cases to even attempt to qualify the rule stated. In an applicable case we would not feel authorized to do so. The rule does not apply here, because we are concerned with what is called a construction, but which is, we think, a usage that had its origin in the duty of exercising judgment and discretion and not in interpretation of doubtful terms under which rights would vest, or which, if changed, would defeat or injuriously affect those rights. If when authorized to adopt a course which to him seemed just to the Government and the railroads, the Postmaster General could pursue the one or the other method of ascertaining the contemplated average then manifestly the method adopted by one could be altered by another so long as the change was made prospective, because being charged with all the duties imposed by law the succeeding Postmasters General were vested with all the powers conferred by law.

The claims of the plaintiffs arose after the issuance of order 412, and no retrospective effect was given to that order. The right to give instructions as to the weighing was as absolute in 1907 as in 1873.

With the wisdom of the change, so long as the right to make it remained, the court has nothing to do. *Wright's case*, 11 Wall., 648.

It may be remarked that the expression in the cases of an unwillingness by the court to depart from a long-continued departmental construction of an uncertain or ambiguous act is referable to the court's action when called upon to construe the law, and they

do not in general refer to the right of a department itself to change its construction while giving it a prospective operation.

92 (d) That proceedings had in Congress at or before the passage of the act of 1907 were a legislative adoption of the divisor of 30 or a recognition of it as a requirement of law.

The act of 1907 did not affect the method of ascertaining the daily average weight. It reduces the rates, and it may be observed that while legislation has touched in rare instances since 1873 the question of compensation, it has uniformly been in the direction of reducing it, except in a limited way as the act of 1907 may affect land-grant roads. Only once since 1873 has legislation referred in terms to the ascertaining of average weights, that being the act of 1905. It may be conceded that by the literalism of the act of 1907 the Congress fixed the rates thereafter to be paid on certain routes, and thus for the first time made a rate that was other than a maximum rate. But in doing that no change was made in the right, power, or duty of the Postmaster General to ascertain the average weights under the permissive features of the law.

As bearing upon the effect of the act of 1907 and upon the method of ascertaining the average weights then in vogue, it is earnestly urged that certain proceedings in Congress, as well as the act of 1907 itself, evidence a purpose on the part of Congress to make permanent the divisor then being used, and that such effect must be given to said act and proceedings.

It is plain that the act does not in terms say what the divisor shall be. The House committee's bill, as reported, provided a method for ascertaining the daily average weight "by the actual weighing of the mails for such number of successive days, not less than one hundred and five." Accompanying the bill was a report explaining the prevailing construction and practice and that the purpose of the said provision was to change the method of ascertaining the daily average weight. This provision in the bill was confessedly subject to a point of order under the rules of the House, and it was accordingly so ruled later. The two amendments offered by a Member were ruled out of order by the Chairman and his ruling was sustained upon appeal. These proceedings were being had in Committee of the Whole House on the state of the Union. The vote that was taken was upon the correctness of the Chairman's ruling, and not upon the merits of the proposed amendments. Placing his ruling upon one of the grounds stated by him that an amendment which will have the effect of changing the discretion vested in an executive officer by law is a change in existing law, the ruling would seem to be correct if we may have recourse to the precedents wherein it is held that an amendment to an appropriation bill having that effect is subject to a point of order. (Hind's Precedents, vol. 4, pp. 569, 570, secs. 3848 et seq.) It may be questioned whether proceedings thus had in Committee of the Whole House on the state of the Union amount to legislation. They can not be accepted as showing the meaning of an act that was adopted containing no reference to the method of ascertaining the average weight. These proceedings were had two years after the act of 1905, where some reference is made to average weights. That the amendments proposed, and for that matter the committee's amendment, would have made definite and mandatory a method of

finding the average weight and would have removed any permissive or directory feature in the law or any discretion of the Postmaster General in its application is plain.

93 Assuming that the statutes under which he acted had authorized the Postmaster General in his discretion to adopt one or another method, the use of the divisor 30 was not mandatory upon his successors, and since Congress has not changed the law, that power continues. We can not say that the refusal of the House, if it were so, to make permanent law on the subject was in fact or effect a making of the divisor fixed and absolute. They can not be said to have included an element which they excluded. Since they refused to adopt the proposed amendments which would have removed the discretion and would have made a fixed divisor of 105, we can not say that they removed all discretion and made a divisor of 90 when the legislation omits any reference to either. Nor is the situation altered by reference to other proceedings in the House and Senate.

The courts have consulted legislative proceedings to learn the history of the period, and it is said in the *Tap Line* cases, 234 U. S., 1, 27, that the debates may be resorted to for the purpose of ascertaining the situation which prompted the legislation.

In *St. Louis & Iron Mountain Railway Co. v. Craft*, 237 U. S., 648, Mr. Justice Van Devanter delivering the opinion, interpreted the law in question according to its terms and then made "a brief reference to the peculiar circumstances in which the new section was adopted," to show that they gave material support to the conclusion to which the court came after considering the terms of the act. After stating the reports of the Judiciary Committees of the two Houses, he adds (p. 661) that while these reports can not be taken as giving to the new section a meaning not fairly within its words, they persuasively show that it should not be narrowly or restrictively interpreted. The act was not silent upon the question involved, and its terms were construed, and this not by what the proceedings showed but by what was "fairly within its words."

Similarly, in *Delaware & Hudson Company* case, 213 U. S., 366, reference is made to certain legislative proceedings, but the court declined to extend the meaning of the statute beyond its legal sense because of a supposed intention not manifested in its terms, and it was said by the Chief Justice that if the mind of Congress was fixed upon a stated proposition, "then we think its failure to provide such a contingency in express language gives rise to the implication that it was not the purpose to include it." This court, in *Atchison, Topeka & Santa Fe R. R.* case, 52 C. Cls., 388, referred to proceedings in Congress for the purpose of ascertaining the subject matter of legislation, to which the mind of Congress was addressed, and to which they gave expression. We can not think that the refusal of one or both Houses to legislate upon a given subject amounts to making mandatory a law which was permissive, or to the withdrawal of a discretion with which an executive officer was charged.

The other cases cited on the briefs are not in conflict with our view.

We hold, therefore, that the Postmaster General had the same authority in 1907 that he had in 1873 and 1875, and thereafter, whether the law contemplated an actual average or a permissive one. Other contentions of plaintiffs are concluded by what has been said.

The case of the land-grant roads depends upon the validity of Order No. 412, and we can not say it was an unlawful exercise of the Postmaster General's discretion under the law. It may be added that the action is by a plaintiff on parts of whose lines are land-aided sections and that the plaintiff contracted for all classes of its routes.

As to all plaintiffs, being free to contract, the considerations to be stated are controlling. Whether the daily average weight should be ascertained according to the literal terms of the act of 1873 or according to the discretion of the Postmaster General, having regard to the questions left for him to solve, the result is the same because in either case their rights were fixed by their contracts to transport the mail.

Second and chiefly: The actions upon contract. Under the views expressed herein, and in the Chicago & Alton and the Yazoo & Mississippi Railroad Company cases, no further discussion of the contention that the statute fixed the compensation is necessary. There was no statutory contract.

It is contended, however, that there was no express contract, and that recovery should be had upon a supposed implied contract, the damages or compensation to be ascertained as upon quantum meruit. While this contention would seem to be a departure from what we think is a proper conclusion from the averments of the petitions, that consideration may be pretermitted.

The general rule is that where one party, at the request of another, does work and labor or performs service for the benefit of such other, the law will imply a promise on the part of the one receiving the benefit to pay the reasonable value of the work and labor done or the service performed where there is no express contract between them fixing the terms upon which the service is to be performed.

"Indebitatus assumpsit is founded upon what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay to the plaintiff. Where the case shows that it is the duty of the defendant to pay, the law imputes to him a promise to fulfill that obligation * * *. But the law never implies a promise to pay unless some duty creates such an obligation, and more especially it never implies a promise to do an act contrary to duty or contrary to law." *Curtis v. Fiedler*, 2 Black., 461, 478; *United States v. Russell*, 13 Wall., 623, 630.

By an express promise a party may agree to pay more than the work and labor done or the service performed is reasonably worth, or he may agree upon a measure for ascertaining the value of the work and labor done or service performed.

It was stated in the Yazoo & Mississippi case that the record did not show a basis upon which the court could properly adjudge what was the reasonable value of the service performed, and plaintiffs urge that the compensation paid for similar service under prior express contracts should be taken as proof of what the service rendered under the implied contract was reasonably worth—that the former course of dealing, in the absence of more definite proof, is sufficient to establish the essential fact. The contention overlooks, however, an important element in the prior express contracts. That element was the authorized exercise by the Postmaster General of discretion in proposing or agreeing to the compensation, and the

court can not supplant his discretion by any of its own, because it has no discretion. What he did in the exercise of his discretion and the performance of his duties when considering his course with reference to a given average weight and the terms of a contemplated contract can not be accepted as proof that a service performed after he had exercised his discretion in another way is to be paid for on the basis which he has rejected. The rule could be applied, as has been done, where both parties understood that the service was being performed without any stipulation by both or offer by either of the terms. To apply it in these cases leads to the result that by refusing to accept the Postmaster General's proposal the carriers can carry the mail, receive regular installments of pay therefor, according to the terms of an offer, and by withholding express assent to a vital term in the offer can impose a contract upon the Government which its agent refused to make. It is well established that a contract can not be imposed upon the carrier. It was not until the act of 1916 that carriers were not free to accept or reject the proposals of the Postmaster General and to refuse to transport the mail.

95 The carrier's rights being well defined, its duties to accept the proposed terms or to refuse to transport the mail is apparent. By its refusal the Postmaster General would have been obliged, in the performance of his statutory duty, to have made other arrangements or to have offered more satisfactory terms. The law will not raise up a promise which involves the breach or defeat of a statutory duty.

When proceeding in a proper case to ascertain reasonable compensation as upon quantum meruit, the pay is commensurate with the service rendered—"that payment should be made for what was done." *Jacksonville, P. & M. R. R. Co.*, 21 C. Cls., 155, 170; *Railroad v. United States*, 101 U. S., 543, 549. A right to recover as upon quantum meruit implies that the party should have such payment as he deserves for the services performed.

To be entirely accurate in such a matter the carrier would have to be paid for the weights carried. These can not be known, and the only basis for them is the ascertained average.

As to the seven-day routes, there can be no question that upon the fullest application of the rule they can not recover as upon quantum meruit in face of the acknowledged fact that they have received payment for the average weight of mails actually carried. Their claims are illustrated near the beginning of this opinion.

If it be conceded that because of a lawful vested discretion the Postmaster General was authorized to contract with railroad companies upon the basis as to 7-day routes of a permissive or factitious daily average weight, and at the maximum rates prescribed by law, and further that Congress by their repeated appropriation recognized or approved his action in that regard, as they had the right and power to do, it must yet follow that a court is without right to increase either the daily average weight or the rates prescribed by statute, whether they be maximum or fixed rates.

On the other hand, if their case rested alone upon that question, it might be said that the average on the 6-day routes could not be decreased. Certainly quantum meruit does not mean that they shall be paid for more average weight than they carried, for more service than was performed, and if the 6-day routes are not strictly in that

situation, it yet follows that the view next stated is determinative and is applicable alike to both classes of routes.

The mails were transported under express and not under implied contracts.

96 Upon the receipt of the distance circular the carrier signed the acceptance, in some instances without qualification, in others with an exception noted therein by its officer, protesting an unwillingness to be bound or refusing to be bound by Order 412. It may be conceded that as to those so objecting there was up to that time no meeting of the minds, and consequently no contract between the parties. Standing alone, "plainly no contract between the parties resulted from the correspondence so far had between them." It is equally true that if the acceptance clause had been signed without exception a carrier could not have sued the Government as for a breach of contract if the mails had not been subsequently offered, because it was yet open to the Postmaster General to adjust the compensation and propose his terms. He was still charged by the statute with the duty of contracting within the maximum rates or for such compensation as he regarded as just and reasonable. But more occurred. The Postmaster General informed the protesting carriers that they could only carry the mails in accordance with the rules, regulations, and laws, and thereafter when he sent to the several plaintiffs the result of his computation, it stated the terms of his proposal. It was not a four-year contract, but was a readjustment of compensation, "unless otherwise ordered," which had the effect of limiting the duration of the contract. *Eastern R. R. case*, 129 U. S., 391; *Delaware & Lackawanna R. R.*, 51 C. Cls., 426. It also stated that the carrier was subject to fines and deductions and to the rules and regulations of the department, and Order 412 was one of these.

A carrier which had qualified its acceptance of the distance circular was not bound to accept the proffered terms. A contract could not be imposed upon the carrier (cases *supra*), nor could it compel the letting to itself of a contract for mail transportation. As is stated in one of the briefs, "it was for the Postmaster General, acting upon his own appreciation of the extent of his lawful power to propose terms, and for claimant, not compelled by law to perform such service, to accept or reject the terms proposed as it saw fit." And while this statement was apparently intended to apply to the situation of the parties as they stood when plaintiff had qualified the terms of the acceptance clause, it none the less correctly states the attitude of the parties thereafter until plaintiff had received and transported the mails and had received periodical payments therefor in accordance with the readjustment notice. The carriers accepted these payments without objection of any kind.

In the *Eastern Railroad Company case*, *supra*, it was said by this court:

"When the extent of an implied contract or the meaning of the language of a written contract are in controversy, the intention of the parties becomes all important. Their acts at the beginning and during the term of the contract acquiesced in on both sides, the claims and construction set up by one party and not denied by the other, go very far to explain, if they do not actually establish by way of

estoppel, the actual contract between them as well as its proper interpretation. (*Otis v. United States*, 19 C. Cls., 467.) The present claimant having no clear and definite time contract was bound to take notice of the Postmaster General's offer of future compensation, and its acts at the time amount to an acceptance of his offer."

97 This case was affirmed in 129 U. S., 391; and it is there said (p. 396):

"Chief Justice Richardson, speaking for the Court of Claims, properly said that the order for the reduction under the act of 1878, and the notice thereof to the company 'constituted an offer on the part of the Postmaster General which the claimant might decline or accept at his pleasure.' Having received the reduced compensation without protest or objection, it may be justly held to have accepted that offer."

In the *Martin* case, *supra*, the Supreme Court stated two principles, both of which are applicable in these cases: The one that the act was merely directory and did not interfere with the freedom of contract, and the other that as the parties were free to contract, effect was to be given to the action and conduct of the plaintiff in having repeatedly accepted, without protest or objection, payments based upon the contract as the Government understood it to be. Other courts have applied the same principles.

In *Coleman's* case, 81 Fed., 824, it is held that even if the construction of the statute therein mentioned is too broad, and the petitioner be entitled to its benefits, he would yet have no right of action in the absence of notice by protest or objection that the payments were not in discharge of the liability.

In *Timmonds' case*, 84 Fed., 933, the Circuit Court of Appeals, Seventh Circuit, took the same view, and, referring to *Martin's* case (p. 934), said:

"It was there ruled that the provision in question is in the nature of a direction by the Government to its agents, and is not a contract between the Government and its servants; that it does not specify what sums shall be paid for the labor of eight hours, nor that the price shall be larger when the hours are more, or smaller when the hours are less;" that being in the nature of a direction, the statute does not constitute a contract to pay for the excess time and that the employee "was under no compulsion, he could have abandoned his service if it proved distasteful or onerous," just as plaintiffs here could have done if there was no express contract.

In *Moses's* case, 126 Fed., 58, the Circuit Court of Appeals, Ninth Circuit, took the same view of the contractual relations between the parties.

In *Averill's* case, 14 C. Cls., 200, 206, it is held that where the employee continued to work, was paid by the day and accepted the payments, he could not maintain his action based upon the theory that eight hours constituted a day's work. *Gordon's* case, 31 C. Cls., 254.

In *McCarthy v. Mayor*, 96 N. Y., 1, the court took the view that the act before them was intended to place the control of the hours of labor within the discretion of the employee rather than of the

employer, and yet held that unless there was an express contract providing for extra compensation, it could not be implied.

In *Grisell v. Noel Brothers*, 36 N. E., 452, the Indiana Appellate Court said that the statute permitted parties to contract, and that if one person employs another to perform work for a stated sum, and at the end of the time pays that sum, and the employee accepts it in payment, he can not afterward recover an additional sum albeit he may have worked for longer hours.

98 "The acts and conduct of the parties in the case supposed are such as to raise a conclusive presumption that the amount received by the employee was accepted in full payment of what was due him. The same rule applies where the work is done by the week or month or year."

It appears in that case, as it does in these, that the plaintiff knew when he entered upon the service the nature and amount of work that was required of him, as well as the compensation he was to receive therefor, and it was said that if he was not satisfied at the end of a day or week with what was being paid him, he should have exacted an agreement for more compensation or exercised his right to quit the employment.

"By continuing in the employer's service under the terms of the employment, he waived any right to claim additional compensation."

The principle is illustrated by *Vogt v. City of Milwaukee*, 74 N. W., 789, where an employee worked 8 hours daily for the first 30 days, and thereafter, without protest, worked 12 hours a day and received the same pay. A city ordinance had provided that 8 hours should constitute a full day's work for city employees. The plaintiffs sued for compensation for overtime and contended that the ordinance entered into and became a part of the contract, and that thereby the city became bound to pay the amount specified for each day of 8 hours' service. A similar contention is made in these cases. The Supreme Court of Wisconsin held otherwise, and said (p. 791):

"The law which allows contracting parties, through the medium of an express contract, to fix in advance the value of a service to be rendered, also allows them to fix the value in cases of implied contract after the service has been rendered. It may as well be fixed by acts of the parties as by express agreement. Here it seems certainly to have been fixed by acts of the parties, and the plaintiff can not now be permitted to dodge or escape the legal effect of his conduct."

It is unnecessary to multiply cases (though some are cited below) to establish the rule that the existence of contractual relations or the acceptance of a proposal can as well be shown by the action and conduct of parties as by their language. What a party does can as well conclude him as what he says he will do. Each time a plaintiff was paid, and received the compensation stated, it "as effectively notified him that his compensation for the time in service was the rate so specified as if he were formally notified." *Vogt v. Milwaukee*, supra, citing *Miller case*, 14 C. Cls., 200.

It was held in *Baird's case*, 96 U. S., 430, where the plaintiff had presented an unliquidated claim to an accounting officer, claiming over \$150,000, which they reduced to about \$97,000, and then sent him a voucher for the latter amount, which he received without pro-

test or objection, that he was concluded by his action in accepting the payment.

The rule was applied in Garlinger's case, 169 U. S., 316, 322, and was recognized in McMath's case, 51 C. Cls., 356.

Cases supra: Central Pacific Co., 164 U. S., 93, 97; Illinois Central R. R. Co., 18 C. Cls., 118, 132, 136; Jacksonville, Pensacola & Mobile Co., 21 C. Cls., 155, 170, 171; 118 U. S., 626; Minn. & St. Louis Ry. Co., 24 C. Cls., 350, 360; Alabama Great Southern R. R. Co., 99 25 C. Cls., 30, *ibid.* 142 U. S., 615; Texas & Pacific Ry. Co., 28 C. Cls., 379, 390; other cases; Chicago & Alton Case, p. 521, 532.

If any effect is ever to be given to a party's action as determining the existence of a contract, these cases call for its application.

It is admitted that the carriers received and transported the mail after the alleged exception to Order 412; admitted that they received compensation in accordance with the readjustment notice; admitted that this compensation was paid monthly or periodically; admitted that the readjustment of compensation was made for no definite period, but "unless otherwise ordered"; admitted that the readjustment of compensation was subject to fines and deductions; admitted in at least one of the cases at bar, and it may be assumed as to others, that fines and deductions were imposed and retained without objection; admitted or shown that the notice stated that the compensation was based upon not less than six round trips per week; admitted or shown that no objection to the payments was at any time made, and that several years intervened before suit, and these things being true, the action and conduct of the plaintiffs were plainly inconsistent with their present contention.

The distance circular proposed no terms and the readjustment notice did. It was the acceptance and transportation of the mail and the repeated acceptance of the monthly or periodical pay after the Postmaster General had replied to the protests, all without protest or objection, that consummated the contract, the terms of which were evidenced by the notice itself. While the carrier had protested it would not consent, it yet consented. A party will not be heard to deny the natural and reasonable effect of his action as regards his contractual relation or to take a position inconsistent therewith when to do so would involve a breach of official duty by the other contracting agent. The law required the Postmaster General to make contracts for mail transportation, to file copies of them (Rev. Stats., sec. 404), and to enforce fines and deductions under the terms of his contracts with railroad companies (act of June, 1903). It did not lie with the carrier to defeat these requirements by a refusal to accede to one term of the proposal and then pursue a course of action antagonistic to the suggested refusal. It can not compel the leaving of the contractual relation to be implied. It could have refused the terms or it could have accepted. It could not select those that served its purposes and leave to the incertitude of the future the ascertainment of the terms upon which the mail was being transported. In a matter of so great public importance, it was its duty to be definite and to speak if it did not intend to be bound. Their action establishes the essential fact. The plaintiffs transported the mails in accordance with the terms proposed by the Postmaster General, and, having been paid the

sums respectively due them, it follows that their petitions should be dismissed. And it is so ordered.

BOOTH, *Judge*, concurring:

I concur in the opinion of the court and might well rest the matter with this statement. Having, however, positive conviction as to the case itself it may not be amiss to briefly discuss some features of the litigation which lead to the foregoing opinion.

The relationship between the carriers and the United States was contractual. The Postmaster General was free under the statute to negotiate and consummate such contracts for the carriage of the mails as he deemed just to both the contractor and the Government, subject only to the express limitations enumerated in the act of 1873. The limitations in the act of 1873, in so far as the present case is concerned, circumscribed alone the maximum compensation to be paid the contractor and prescribed a minimum period of weighing to ascertain the "average weight per mile per annum" upon which the compensation was to accrue. There is nothing aside from these provisions in the statute which irrevocably bound the Postmaster General to contract with the carriers on the basis of the mathematical process adopted by him after the statutory weighing period had been observed; he might pay the maximum compensation; he might pay less; and surely was invested with the official discretion indispensable to the making of an agreement fair to both parties. Within the zone prescribed by the terms of the act of 1873 there was an unfettered field wherein the right of contract was unabridged. The claimant company and the Government within these limits stood upon an equality and the bargain consummated was subject in every way to the ordinary rules governing ordinary contracts. The claimant company accepted the mails and performed its part of the contract in the face of an express provision, directly made a part of the contract, in response to claimant's protest, and finally accepted the compensation fixed in the contract without further protest or objection. *Yazoo & Miss. Valley R. R. v. United States*, 50 C. Cls., 15.

A careful review of all the legislation pertaining to the administration of the Post Office Department, and particularly with respect to the transportation of the mails, discloses a legislative intent to refrain from denying a wide discretion to the Postmaster General in the matter of administrative detail. If Congress designed a fixed and determinate compensation to be paid upon the average mileage basis per annum there would have been no necessity to do more than provide the means of ascertaining the same and thereby limit the contracting authority of the Postmaster General. The various statutes upon this subject, as most pertinently observed by the Solicitor General, were clearly intended to fix a maximum compensation, fair in any event to the railroad company and of sufficient elasticity to protect the Government. The field of fair negotiation, except as expressly provided, was left open, and the railroad company was under no compulsion to accept the terms of a contract it believed to be onerous and unremunerative. (See cases cited in opinion of Chief Justice.) Having engaged to perform a service under the terms of a contract authorized by law and having performed said service and

accepted the full compensation agreed upon by the parties, it is difficult to perceive upon what authority a suit for increased compensation can be predicated in view of the authorities cited in the Chicago & Alton case, 49 C. Cls., 520, 521.

The act of 1873 expressly precludes the possibility of preciseness in ascertaining compensation to be paid the railroad companies for the transportation of Government mails. "The pay per mile per annum shall not exceed * * *. On routes carrying their whole length an average weight of mails per day * * * the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working days, not less than thirty * * *." This language formulates a method inherently discretionary. The very terms used erect a flexible basis to meet changing conditions and varied circumstances. Thirty days was considered by Congress as the minimum of fairness in the ascertainment of an annual average. Can it be said that a long-continued departmental opinion that the period stated continues to bring to the railways a fair compensation ripens into an unchangeable law, absolutely concluding the department from meeting changed conditions and circumstances? Judge Barney has discussed this phase of the case, and with his discussion I unreservedly agree. I think the statute abounds with express and unambiguous terms which unmistakably repose a wide discretion in the Postmaster General a clear legislative intendment to do no more than prescribe such limitations as Congress deemed wise, leaving the Postmaster General free to act in all other respects.

BARNEY, Judge, concurring:

It has been said that wise men often change their opinions, and I wish to exemplify the fact that unwise men sometimes do the same thing. My views of the act of 1873 will be found expressed in the case of N. Y., N. H. & H. R. R. Co., decided February 25, 1918, 53 C. Cls., —.

I do not think it can be judicially said that by the terms of section 4002 R. S. any divisor was absolutely provided for. The Postmaster General was thereby directed to pay the railroads in proportion to the average weight of the mails carried, this average to be determined by weighing the same at least once every 4 years for not less than 90 working days. Of course this would imply some mathematical process which would involve some kind of a divisor. In any event the compensation paid should not exceed a definite sum named. This weighing, whether by the railroads as at first provided or under the supervision of the Postmaster General himself, was for his benefit alone and for the purpose of enabling him to exercise wise discretion in making contracts for the carriage of the mails. The details to be followed in the weighing in order to approximately obtain the average was entirely at the discretion and under the direction of the Postmaster General. It was for his information it was to be obtained, and it was for him alone to say how this was to be done. I can see why this long continued exercise of this discretion in a certain way should not be changed as to existing contracts because contracts are construed according to the intention of the parties to them when they

were executed, and in this case these existing contracts were understood by both parties to have been executed in the light of the then existing method of obtaining average weights. But I do not see how a discretionary authority can ever be said to ripen into law by continued usage. Presumably the Postmaster General for a succession of years obtained such average weight in a way he thought best adapted to do justice to the different classes of railroads carrying the mails. This discretion seemed to be implied in the law.

Circumstances mentioned and described in the opinion of the Chief Justice became materially changed, and what was perhaps at one time a proper exercise of this discretion became improper, and a later Postmaster General in the exercise of the same power of discretion obtained this average weight in another way. In both instances it was a proper exercise of discretion which was once changed in effect, and can be changed again if reasonably within the statute so as to affect the future contracts for the carriage of the mails.

102

DOWNNEY, *Judge*, concurring:

I concur fully in all that has been said by the Chief Justice in the opinion of the court. Perhaps a word more might be added with reference to the theory presented in those cases in which the railroad companies injected into their proposals to carry the mails "upon the conditions prescribed by law and the regulations of the department" an exception with reference to Order 412, that the subsequent delivery of mails to such railroad for transportation by the United States gave rise to a contract in which Order 412 was not embodied. The contention might have force if the transaction rested there. But it did not. The Postmaster General specifically declined to permit any exception as to Order 412 and insisted that the contract should be subject to all the regulations of the department, as in its terms it was, and if effect is to be given to subsequent action of either of the parties, as it undoubtedly must be, it is to be found in the voluntary acceptance by the railroad companies of the mails for transportation under these circumstances, after the specific refusal of the Postmaster General to modify terms, and which action can not be interpreted otherwise than as an acceptance of a contract which was subject to and in which were embodied all the regulations of the department applicable thereto. The service was performed under such a contract, compensation was paid and accepted thereunder, and it seems idle now, because of an antecedent protest or an attempted but rejected modification of terms, to contend that the contract is something else than as entered into or is in some respects not binding upon one party thereto. It is difficult to see any basis upon which, after having entered into a contract not tainted with fraud or duress, performed service thereunder and received compensation therefore in accordance with its terms, the court can now be asked to write and enforce a different contract. The equities of rule 412 are capable of demonstration, the inherent and unexhausted discretion of the Postmaster General is as evident as it was necessary, but in my judgment, while other and related matters are proper subjects of discussion, we have to do, in the last analysis, with a contract relation and must leave the parties where, by their contract, they have placed themselves.

HAY, *Judge*, concurring:

It would seem, and indeed is, a work of supererogation to add anything to the very able and exhaustive opinion of the Chief Justice in this case. In his opinion he has discussed clearly and with singular ability every phase of it. Although I am convinced of the soundness of the views therein expressed, I have deemed it not unwise to very briefly express my views on one branch of the case.

The plaintiffs, in these cases, seem to insist that while the Postmaster General was given discretion, under the law, to determine the manner in which their compensation for carrying the mails may be determined, yet that he, having once exercised that discretion, could not change the method so adopted. The above is a bald statement of their contention. The mere statement of it is its refutation.

103 It would be monstrous to say that an executive officer, clothed with discretion to do certain things, in exercising the discretion given him, is bound to continue to act in the method first adopted by him, no matter whether that method was equitable or inequitable, proper or improper, just or unjust to the parties affected.

The fact that it was a long-continued usage does not change the principle. If in the course of time, it is discovered that the usage adopted is unjust to one of the parties, surely it will not be denied that the executive officer, exercising the discretion conferred upon him by law, can change the method; certainly this must be so when the change is not made to affect any person with whom a contract is being carried out, but applies only to contracts to be made in the future.

The opinion of the Chief Justice fully discusses and covers all the points of the case and I heartily concur in his conclusions.

104

VII. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Eleventh day of March, A. D., 1918, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge, and decree that the Northern Pacific Railway Company, as aforesaid, is not entitled to recover and shall not recover any sum in this action of and from the defendants, the United States, and that the petition be and it hereby is dismissed.

BY THE COURT.

105 VIII. *Claimant's Application for, and Allowance of, Appeal.*

Comes now the Northern Pacific Railway Company, Petitioner in the above entitled cause, and by counsel prays the Court to grant an appeal to the Supreme Court of the United States from the decision and judgment of the Court of Claims, in favor of the United States, dismissing the petition, said decision being rendered March 11, 1918.

BRITTON & GRAY,
Attorney- for Petitioner.

Filed May 4, 1918.

Ordered: That the above appeal be allowed as prayed for.
By THE COURT.

May 6, 1918.

106

In the Court of Claims.

No. 31304.

NORTHERN PACIFIC RAILWAY COMPANY

VS.

THE UNITED STATES.

I, Sam'l A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law and appendix thereto; of the opinion of the court and of the concurring opinions; of the judgment of the court; of the application of the claimant for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 7th day of May, A. D., 1918.

[Seal Court of Claims.]

SAMUEL A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 26,503. Court of Claims. Term No. 445. Northern Pacific Railway Company, appellant, vs. The United States. Filed May 11th, 1918. File No. 26,503.

Office Supreme Court, U. S.
FILED

OCT 31 1919

JAMES D. MAHER,
CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 109.

**THE NORTHERN PACIFIC RAILWAY
COMPANY**

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

**C. W. BUNN,
ALEX. BRITTON,
EVANS BROWNE,**
Counsel for Appellant.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 109.

THE NORTHERN PACIFIC RAILWAY
COMPANY

vs.

THE UNITED STATES.

BRIEF FOR THE APPELLANT.

This case, known as one of the mail divisor cases, comes to this Court on appeal from a final judgment of the Court of Claims, dismissing appellant's petition.

The petition sets forth the claimed contractual relations between the parties, under which appellant carried the mails and the United States agreed to pay for that service.

The particular point of controversy arises from a reading of the act of March 3, 1873 (17 Stats., 558), which provided *inter alia*:

"For increase of compensation for the
 "transportation of mails on railroad routes
 "*upon the condition and at the rates herein-*
 "*after mentioned*, five hundred thousand
 "dollars, or so much thereof as may be nec-
 "essary: *Provided*, That the Postmaster
 "General be, and he is hereby, authorized
 "and directed to *readjust the compensation*
 "*hereafter to be paid* for the transpor-
 "tation of mails on railroad routes *upon*
 "*the conditions and at the rates here-*
 "*inafter mentioned*, to wit, that the mails
 "shall be conveyed with due frequency
 "and speed; that sufficient and suit-
 "able room, fixtures, and furniture, in a
 "car or apartment properly lighted and
 "warmed, shall be provided for route agents
 "to accompany and distribute the mails, and
 "that the pay per mile per annum shall not
 "exceed the following rates, namely: on
 "routes carrying their whole length an av-
 "erage weight of mails per day of two hun-
 "dred pounds, fifty dollars; five hundred
 "pounds, seventy-five dollars; one thousand
 "pounds, one hundred dollars; one thousand
 "five hundred pounds, one hundred and
 "twenty-five dollars; two thousand pounds,
 "one hundred and fifty dollars; three thou-
 "sand five hundred pounds, one hundred
 "and seventy-five dollars; five thousand
 "pounds, two hundred dollars, and twenty-
 "five dollars additional for every additional
 "two thousand pounds, *the average weight*
 "*to be ascertained in every case by the act-*
 "*ual weighing of the mails for such a num-*
 "*ber of successive working days, not less*

“*than thirty*, at such times, after June 30,
 “1873, and not less frequently than once in
 “every four years, and the result to be stated
 “and verified in such form and manner as
 “the Postmaster General may direct:
 “* * *

This act crystallized into law the practice theretofore initiated and adopted by the Postmaster General to make uniform and fixed the compensation to be paid for transporting the mail, and from the date of its passage to the adoption of Order 412, June 7, 1907, a period of thirty-four years, the uniform, uninterrupted practice of the Post Office Department was to weigh the mails quadrennially for not less than thirty successive working days, and divide the total weight carried by six or its multiple in order to ascertain and fix the average weight carried daily.

June 7, 1907, however, the Postmaster General issued Order 412, which provided:

“That when the weight of mail is taken on
 “railroad routes the whole number of days
 “included in the weighing period shall be
 “used as a divisor for obtaining the average
 “weight per day.”

As a result of this order, claimed by the petitioner to have been arbitrarily issued, without authority of law, and in excess of his power, all weights were divided by seven or its multiple, whether mail was carried three, six, or seven days

per week, and the natural result was to reduce the average daily weight and the pay proportionately. Judgment was prayed by appellant for the difference between the amount paid by applying Order 412 and what should have been paid had the daily average weight of mail carried been calculated by using the six-day divisor.

The questions of law involved have, up to the present time, seemed to escape a clear judicial understanding. In the original case of the Chicago & Alton Company, the Court of Claims originally held Order 412 invalid and awarded judgment to the company. Upon rehearing, the former judgment was reversed and the petition dismissed. Upon appeal to the Supreme Court of the United States, the case was voluminously briefed and twice orally argued, with a final affirmance by a divided court and without opinion.

The present case was then presented to the Court of Claims and a decision rendered dismissing same, and error of law in such decision is assigned as follows:

I.

In finding as a conclusion of law, from the facts found, that plaintiff was not entitled to recover.

II.

In finding that the Postmaster General had discretionary power under the law to issue Order 412.

III.

In not finding that Congress having definitely fixed the rate and basis of pay, it was not within the discretionary power of the Postmaster General, in the absence of an express contract or agreement so providing, to impose upon the company a lesser rate of pay or a different basis of pay with consequent reduction of compensation.

IV.

Having found that a six-day service was called for, it was error to find any lawful authority in the Postmaster General to impose upon the company, over its protest, Order 412, calling for a seven-day divisor.

V.

In not finding that as to mail routes over which the company actually carried mail but six days in the week, it was arbitrary and illegal to divide the total weight by any multiple of seven.

VI.

In finding that, notwithstanding appellant, before beginning service, expressly refused to be bound by Order 412, nevertheless said order was valid and binding upon it and controlled its pay for services rendered.

VII.

In finding that under an implied contract, appellant was bound by Order 412, which it expressly refused to accept or recognize.

VIII.

In dismissing the petition.

ARGUMENT.

The right of appellant to recover rests upon four distinct grounds:

(1) The act of July 2, 1864, authorizing the incorporation of the company, which has been declared to have been a contract as well as a law.

(2) The agreement clause of the distance circular signed in 1907, under which the company agreed to carry the mails subject to the conditions prescribed by law and the regulations of the Department applicable to railroad mail service.

(3) The act of March 3, 1873, prescribing the method of weighing the mails and fixing the rate of pay for carrying the same.

(4) The actual transportation of the mail, entitling the company to the compensation prescribed by law, if no contract was in fact or in law entered into.

I.

The Act of July 2, 1864, Authorizing the Incorporation of the Company, Which has Been Declared to Have Been a Contract as Well as a Law.

The acts of Congress, approved July 2, 1864 (13 Stats., 365), May 5, 1864 (13 Stats., 64), and March

3, 1865 (13 Stats., 526), incorporating the Northern Pacific Railroad Company and making grants of land to aid in its construction, were not only grants and laws, but contracts, under which the railroad company undertook to construct a railroad and agreed that when constructed same should be a post route and military road, subject to the use of the United States, "at such price as Congress may by law direct," and "until such price is fixed by law the Postmaster General shall have the power to determine the same."

See *Burke vs. So. Pac. R. R. Co.*, 234 U. S., 669.

Menotti vs. Dillon, 167 U. S., 703.

U. S. vs. Grand Rapids R. R., 154 Fed., 131.

These granting acts were supplemented by the act of June 8, 1872 (17 Stats., 309), providing:

"That all railway companies to which the United States have furnished aid by grants of lands, right of way, or otherwise, shall carry the mails at such prices as Congress may by law provide; and until such price is fixed by law, the Postmaster General may fix the rate of compensation."

At the very beginning of this discussion it should be borne in mind that by reason of the above-quoted provisions of law the Northern Pacific Railway Company was, and still is, under legal obligations to carry the mails of the United States.

It is not in the position of a free agent to negotiate terms with the Postmaster General, pending which it might lawfully decline to carry the mail, but is obliged to perform the service and be relegated to its claim that Congress has by law fixed its rate of pay, or that the terms fixed by the Postmaster General are confiscatory and unjust.

Being under such legal obligation has Congress provided the price to be paid for the service or has it left the same discretionary with the Postmaster General?

Between 1862 and 1873, as evidenced by the above-quoted laws and many others of similar import, Congress evidenced a purpose to itself fix the price to be paid for transporting the mail. Prior to 1873, there had been three acts of Congress containing provisions prescribing such rates. The first, approved July 7, 1838, authorized the Postmaster General to cause the mail to be transported "upon reasonable terms," not to exceed twenty-five per centum what similar transportation would cost in post coaches. The second, approved January 25, 1839, restricted the authority of the Postmaster General to "three hundred dollars per mile per annum, for one or more daily mails." The third, approved March 3, 1845, arranged the service in three classes, "according to the size of the mails," the "speed with which they are conveyed," and the "importance of the service," with certain

limitation of maximum price to be paid to each class.

To this point of time we are dealing with conditions affecting two free contracting agents, either one of whom was in position to decline a contract if its terms were not satisfactory and one of whom was limited by law in the amount it could pay.

Under these circumstances and with no method authorized or fixed for a uniform service or method of fixing pay, the Postmaster General was obliged to make the best contract he could with each carrier, and, with the increase of railroad routes and volumes of mail carried, this became annually more and more difficult and burdensome.

Then follows the various acts granting lands and rights of way to railroads, all containing provisions making them post routes and obligating the grantees to carry the mail at such price as Congress might prescribe, with a proviso that until Congress acted, the Postmaster General might fix the price. From the passage of the act of March 3, 1845, Congress manifested its intention that the railroad companies engaged in transporting the mails should receive an equal and just compensation, according to the service performed, said act specifically providing that the Postmaster General should—

“Insure, as far as may be practicable, an equal and just rate of compensation, according to the service performed.”

Whilst the act prescribed the rate to be paid, it did not fix the basis upon which the rate should be computed, and so the Postmaster General, in 1867, fixed the basis by determining that maximum pay should be allowed for a service of six round trips per week. Some companies carried mails every day in the week, some did not carry them on Sundays, and some performed more than six round trips per week. All these varying conditions were existing and considered and the adjustment was applicable to all, by providing for a uniform service of six round trips per week as earning the maximum compensation. (See findings IV and XI.) Such uniform contractual service of six round trips has been ever since enforced by the Postmaster General. A uniform service having been arrived at and settled, the Postmaster General, beginning in 1867, ascertained the average weight of mail carried by weighing the mails every day they were carried and dividing the total by the number of "working" or "contract" days. The weights were taken every day in order to compensate those companies which carried the mails on Sunday, or one day more than necessary to secure maximum pay.

At this time, therefore, the Postmaster General had settled to his own satisfaction those discretionary features of the law, to wit: due frequency and speed. All railroads performing six round trips per week were to receive the maximum compensa-

tion provided for by law, with the reserved right in the Postmaster General to send mail on any other and additional trains without additional pay. Under such conditions, prevailing in 1867 and prevailing now, a train operated on Sunday was no more within the service contracted for than one or two extra trains run on week days, and every element entering into a uniform, equal and just rate of compensation became fixed and determined.

Accordingly, the Postmaster General desired these elements to be carried into law, and the act of 1873, prepared by the Postmaster General (Senate Report 478, 43d Congress, 1st Session, p. 18), was unquestionably intended to relieve him, save on purely administrative matters, of much, if not all, of the discretion which had been the cause of so much trouble and of difficult application under discretionary contracts with each separate railroad company.

The act provided:

“That the pay per mile per annum shall
 “not exceed the following rates, namely: On
 “routes carrying their whole length an av-
 “erage weight of mails per day of * * *
 “pounds * * * dollars, * * * The average
 “weight to be ascertained in every case by
 “the actual weighing of the mails for such
 “a number of successive working days, not
 “less than thirty, at such times * * * as the
 “Postmaster General may direct.”

Whatever may have been the state of the law prior to the act of 1873, either with respect to the rates or the basis upon which they were to be computed, there has been no indefiniteness about these matters since, and it was the express wish of the Postmaster General that there should be none.

It is, therefore, not only a reasonable, but a necessary conclusion that when Congress came to a consideration of the act of March 3, 1873 (17 Stats., 558), it was meant to be "the fixing of rate of pay" so often previously referred to and promised, and a study of the provisions of the law as enacted fully confirms this view.

1st. It authorized and directed the Postmaster General to readjust the compensation hereafter to be paid "upon the conditions and at the rates" fixed in said law.

2d. It provided that mails should be conveyed with due frequency and speed, but discretionary determination by the Postmaster General upon this point did not in any way affect the rate of pay thereafter provided for.

3d. Certain suitable rooms, fixtures, furniture, cars, and other accommodations were to be provided, but here again the Postmaster General's discretion did not extend to the rate of pay.

4th. Pay was fixed upon an average weight of mail carried over the road, and

5th. Such average weight of mail was to be ascertained in every case "by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times after June 30, 1873, and not less frequently than once in every four years."

This definitely fixed by law the basis upon which the rates of pay should be computed. It carried out the many-times repeated proposal of Congress to so fix the price of such transportation, and it confirmed and ratified the action and recommendation of the Postmaster General that Congress should by law fix such price, and thereby deprive him of any discretion previously conferred or exercised. He had tested the average weight system; he had settled upon a six-day service as earning maximum pay, and he had urged that same be unalterably fixed by law.

We most earnestly and seriously ask the Court to carefully consider these conditions existing at the time the act of 1873 was enacted into law, because, in our opinion, a clear understanding thereof will establish that whereas Congress has at times authorized the Postmaster General to readjust compensation in certain particulars, specifically set out in the statutes giving him that authority, it

has never at any time, since the act of 1873, changed the basis upon which rate of pay must in every case be computed, and the Postmaster General has never since 1873 changed the terms of contract making six round trips per week the minimum service for maximum pay.

It was said by Mr. Justice Barney, in speaking for the Court June 2, 1913:

“The law of 1873 made two distinct provisions relating to payment to be made to railway companies for the transportation of mails: (1) the rate of a certain sum per mile for the average weight of mails carried; (2) the basis upon which this average weight was to be obtained; and there would have been no difficulty in obtaining this average weight if all of the railways had carried the mails the same number of days in the week.”

The learned justice might have escaped even this semblance of doubt had he referred to the fact that under their contracts all railways did carry the mails the same number of days, to wit, six round trips per week. Every railroad was placed upon an exact equality as to service by the action of the Department, inaugurated in 1867 and continued to this time, of calling and contracting for six round trips per week, no more and no less.

In the light of this fact, therefore, there can be no reasonable doubt but that Congress in fixing

the rate of pay, and the basis upon which such rate was to be computed, also established the thirty working-day period of weighing, with a knowledge and clear understanding that "working" meant "contract" days as well as "secular."

There having been established, both by custom and by contract, a uniform six-day service upon all railroads, it is unnecessary to theorize as to what must be done to secure the daily average weight of mails carried by six-day or seven-day roads. They were all six-day roads, and no more difficulty should be, was, or is experienced in ascertaining such weight when carried on Sunday than in the cases where from two to twenty trains carried mail every day. All mail carried was weighed and the aggregate weights were divided by thirty, which was, and ever since has been, the whole number of "working" or "contract" days during the weighing period.

No question of difficulty has ever been suggested in ascertaining the daily average mails carried by the Pennsylvania Railroad Company between New York and Philadelphia, although probably forty trains a day perform the service. It is not the number of mail-carrying trains which controls the average, it is the total weight carried by all trains, divided by not the number of trains, but by the number of "working" or "contract" days. As a matter of fact, roads carrying the mail for

the full contract time of six round trips per week, had no real daily average, because they did not carry mail every day. They did, however, carry the mail every "working" or "contract" day, and in this light the law loses all possibility of misconstruction or misapprehension.

These are the simple, plain reasons governing the interpretation of the law of 1873. Congress was carrying out its oft-repeated promise to fix the price of carrying the mails and to see "that each railway company shall receive, as far as practicable, a proportionate and just rate of compensation, according to the service performed."

Congress not only specified how this should be done "in every case," but the Postmaster General wanted it done, so that he not only would be authorized but bound, beyond dispute or question, to continue the practice he had instituted under his weight circular. It was his wish to have established by law what he in his discretion had established by executive order.

The six round-trip service having been made universal, it naturally and automatically fixed the divisor six. Even as to railroads performing service on Sunday, the average could not be changed, because Sunday service never was and is not now within the contract and could be discontinued at any time without a reduction of compensation.

Some counsel have in the previous arguments in

these cases, and undoubtedly will in this, call the attention of the Court to the ordinary accepted meaning of the words "working days" as distinguished from Sundays, and both the opinions of Chief Justice Campbell and Mr. Justice Barney refer to and lend some support to this view.

Other counsel contend with force that as the act of 1873 admittedly did not provide for two or three different divisors, according to the service performed, it must have fixed the divisor six. This argument proceeds upon the theory that if the act had stopped by providing:

"On routes carrying their whole length an average weight of mails per day of * * * pounds * * * dollars,"

it would have necessitated the Postmaster General obtaining exact averages, which, in the actual administration of the law, would have caused some embarrassment. In the case of roads carrying seven days he would have had to divide the aggregate weights by the whole number of days in the weighing period, and the word "working" could be left out of the law as superfluous. But, under such an arrangement, it would have been necessary to arbitrarily divide by seven the aggregate weights carried by other roads only six days a week. Therefore, if the act had stopped as above quoted and the Department had adopted a seven-day divisor for all routes, he would have secured for the six-

day routes an assumed and unaccurate daily average. It would seem, therefore, since the practical application of the act, as quoted, *supra*, without the modifying clause providing the method of ascertaining the daily average, would have resulted either in two divisors or an assumed and manifestly unfair daily average on the six-day routes, it would be more reasonable to construe the whole act as calling for a six-day divisor, as was done, rather than put the assumed average on the seven-day routes, performing a superior service.

It would have been and is now impossible to apply the act of 1873, either foreshadowed as above set forth, or in its entirety, to conditions as they actually existed, or as they exist now, so as to get one uniform divisor out of it, without having an assumed daily average for one or the other of the six or seven-day routes, except upon the grounds undoubtedly fixed by the Postmaster General and the law, of a common contractual service by all roads of six round trips per week and a consequent divisor of six to secure the daily average weight.

It is obvious that the clause providing how the daily averages should be ascertained, so qualifies the rest of the section that it makes its meaning more clear. It was as if Congress had said:

“What we mean by ‘average’ weight per
“day is the average assignable to the work-
“ing days, and that is why we take pains to
“insert the word ‘working’ at this point.”

The very insertion of the word "working" established a working-day divisor, and without giving that word its ordinary and accepted meaning we render meaningless the entire proviso to the section, a result which cannot possibly receive judicial sanction.

We think enough has been said to demonstrate that with the approval and at the request of the Postmaster General, Congress in the act of 1873 undertook to carry into effect its promise to "fix the price" to be paid for transporting the mail, and as it placed beyond the power of the executive to fix the rate upon any other basis than the daily average weight of mail carried, it equally provided that such average should be ascertained by dividing the aggregate weights by thirty, the number of "working," "contractual" or "non-secular" days in the weighing period. Having so fixed the rate of pay and the basis for computing it, there was no power in the Postmaster General to change it, as he subsequently attempted to do by Order 412.

There is no dispute as to the fact that those charged with the administration of this act, and all subsequent acts relating to railway mail down to the issuance of Order 412, have construed them to mean that the BASIS upon which to compute the compensation to be paid was exactly as we have stated, and that such compensation has, during all those years been actually computed upon that basis. If there had never been another act of Congress on

the subject, Order 412 would be null and void, as contravening such construction, unless the defendant could show such construction to be in violation of the plain meaning and intent of the statute, and therefore could not be read into the contracts under which railroad companies performed the services.

It is most essential to clearly bear in mind that Congress in legislating had expressly provided:

(1) For an *annual* and not a *daily* rate per mile of compensation. Whether this rate is in the discretion of the Postmaster General is immaterial, because he has not exercised it in this case.

(2) That the rate, however ascertained, is to be applied to the average daily weight of mail as the basis.

(3) That the rate, when multiplied by the average daily weight and the number of miles, gives the aggregate compensation per annum for a given route.

If the basis of pay prescribed by Congress had been on the *annual* weight, thus coinciding with the rate, no difficulty could have arisen. All three elements—the rate, the distance and the weight would be ascertained and known, whether the roads carried the mail six or seven days in the week. In like manner, if the rate prescribed had been “per day” instead of “per annum,” no difficulty could have arisen. Each road, whether operating six or

seven days, would have received exactly the same rate per pound per mile.

The danger of injustice lay in the application of an *annual* rate, whether prescribed by statute or by the Department, to "the average weight of mail *per day*." The real question at issue is what Congress meant by the language "average weight of mail per day."

If this language means the average weight moved on the days the mail is carried, whether it be six or seven, then a road carrying 1,000 pounds per day for six days in a week, and thus carrying a total of 313,000 pounds per annum, would receive exactly the same compensation per mile as another road carrying 1,000 pounds per day for seven days or 365,000 pounds per annum. The average daily haul of each, while actually performing service would be 1,000 pounds.

The whole controversy is really due to a confusion of thought, resulting from the difficulty of applying the same *annual* rate to an average *daily* basis of service performed with respect to two classes of workers, one actually working 313 days, the other 365 per annum.

At the time Congress established the system of annual compensation, based upon the daily average weight, the majority of railroads carried mail only six days in the week, and the daily average then contemplated was clearly not the calendar day

average but the secular working or contract day average of "six round trips per week." When the railroads began to enlarge the service and included Sunday trains, natural hesitation would have been met with, if such expansion meant a reduction in the gross annual compensation. The only fair way to reckon with this more frequent service, based upon the average daily weight, without reducing the compensation per pound per annum paid to six-day routes, was to do the very thing the Department did, namely, to treat every route as a six-day route and make uniform contracts or agreements calling for a six-day service, and apply to the aggregate weight of mails carried the working day divisor of six, irrespective of whether service was performed for six or seven days. It is plain this did not result in any increase of pay to the seven-day service, either in the rate of pay or rate per annum for carrying the same volume of mail. The only effort was not to penalize them for rendering a more frequent service than their contract called for.

The history of legislation affecting this basis of pay, as distinguished from the rate to be applied to it, as well as the history of the various unsuccessful attempts to change such basis, makes it clear that Congress understood, ratified, and confirmed this action, when in 1905 and again in 1907 it made mandatory the application of the general annual

rate to an average daily weight and provided that such average should be ascertained "in every case" by actual weighing for a number of successive *working days*.

Conceding, if necessary, that the Postmaster General had a discretion over the annual rate, he has not exercised that discretion by reducing the maximum, but has attempted to vary by regulation the *basis* which Congress itself not only fixed, but has expressly declined to change or authorize him to change, and the conclusion must be that his regulation is void and the lawful, established, equitable and only just basis must be used in fixing the compensation to be paid.

The solving of the question of the validity of Order 412 does not, therefore, depend merely upon the long uniform interpretation of this statute by those charged with its administration. The method of obtaining the average daily weight of mails prior to and at the time of the passage of the act of 1873, taken in conjunction with the language of the act, shows this interpretation to be nothing more nor less than the carrying into effect of the plain purpose of Congress. This cannot be questioned without doing violence to the language of the act and to well-established rules of interpretation.

It will be seen, however, from subsequent acts of Congress, that there have been repeated legislative affirmances of this interpretation.

II.

Legislative Re-enactment.

Act of July 12, 1876.

It has shown that the basis of pay was fixed originally by the Postmaster General in 1867 as the average daily weight of mail carried, ascertained by using the working days only as a divisor and predicated upon a contractual service of six round trips per week.

It has also been shown that the act of 1873 provided the same basis of pay and that it has been so continuously construed by those charged with the administration of the law.

At the time the act of July 12, 1876, was passed, Congress had, from time to time since the year 1867, been making appropriations to pay for the transportation of the mails by the railroad companies, and the amounts arrived at and paid under said appropriations were determined always upon the basis of pay herein contended for. Congress knew the basis of pay fixed by the Postmaster General in the year 1867, and it also knew that the post-office authorities charged with the administration of the act of March 3, 1873, had understood and construed it to prescribe the same basis. This was the correct interpretation of said act in carrying out the intention of Congress, to fix by law definitely both the

rates of compensation and the basis upon which they must be computed, so that it could in the future regulate the price to be paid for railway mail service by simply increasing or reducing the rates a certain per centum. Therefore, when Congress came to reduce the compensation to be paid to the railroad companies for transporting the mails, by the act of July 12, 1876, it expressly referred to both the rates and the basis of pay, as follows:

“That the Postmaster General be, and he
 “is hereby, authorized and directed to read-
 “just the compensation to be paid from and
 “after the first day of July, eighteen hun-
 “dred and seventy-six for transportation of
 “mails on railroad routes by reducing the
 “compensation to all railroad companies for
 “the transportation of mails ten per centum
 “per annum from the rates fixed and allowed
 “by the first section” of the act “approved
 “March third, eighteen hundred and
 “seventy-three, for the transportation of
 “mails on the basis of the average weight.”

No rates are stated in the act of March 3, 1873, except those named as the maximum, and they are “the rates fixed and allowed” from which the ten per centum per annum was directed by the above act to be deducted. It could never reasonably be argued that because only the maximum rates were stated, the Postmaster General could, since the passage of the act of July 12, 1876, have the discretion to name a lower rate, and from this lower rate de-

duct a further ten per centum per annum under this act. The argument is just as strong against the authority or discretion of the Postmaster General to change the basis of the average weight, referred to in the statute. The designation of a certain per centum less than the present rates, computed upon a stated basis, necessarily fixes both the rates and the basis. It would be impossible to figure the per centum of reduction of the railway mail pay, if there were anything indefinite about either the rates or the basis upon which they were to be computed. The ten per centum reduction was to be calculated upon the rates as "fixed and allowed," by the act of March 3, 1873, "on the basis of the average weight" as ascertained at that time, and it was so calculated and deducted. It was calculated and deducted from the compensation of the railroad companies, computed upon the average daily weight, ascertained by weighing the mails every day in the weighing period (including Sundays) and dividing the total by the secular or working days only. It could never be reasonably argued, since the passage of the act of July 12, 1876, that the Postmaster General had any authority or discretion to issue and enforce any order changing the basis of the average daily weight so as to lessen the compensation of the railroad companies, and then in pursuance of said act make a further reduction thereof of ten per centum.

The argument that the Postmaster General had

the right, under the act of March 3, 1873, to fix different rates from those named in said act, so long as he did not exceed the maximum rates named (the language of the act being that the rates "shall not exceed" a certain amount), is equally fallacious, for if he had had any such authority or discretion he could have reduced the rates himself, and no act of Congress for the purpose would have been necessary.

The act of July 12, 1876, further provides as follows:

"And the President of the United States
 "is hereby authorized to appoint a commis-
 "sion of three skilled and competent persons,
 "who shall examine into the subject of trans-
 "portation of the mails by the railroad com-
 "panies, and report to Congress at the com-
 "mencement of its next session such rules
 "and regulations for such transportation
 "and rates of compensation therefor as shall
 "in their opinion be just and expedient, and
 "enable the Department to fulfill the required
 "and necessary service for the public. And
 "to defray the expense of said commis-
 "sion, the sum of ten thousand dollars is
 "hereby appropriated out of any money in
 "the Treasury not otherwise appropriated."

This language is also incompatible with the idea that the Postmaster General had any authority or discretionary power at that time to change the rates of compensation to be paid for railway mail service, whether by changing the basis upon which the

rates were to be computed or otherwise, and certainly no statute has been enacted since that time giving him any greater powers in this regard. To hold that the matter of fixing the rates and basis of pay, or either of them, was at that time vested in the discretion of the Postmaster General, would be to render the appointment of the above commission a vain and useless thing, at an expense of ten thousand dollars.

This act, therefore, must be taken as another legislative affirmance of the interpretation given to the act of March 3, 1873, by those charged with its administration, and as being wholly inconsistent with the validity of said orders Nos. 165 and 412.

Act of Congress Approved June 17, 1878.

The Act of June 17, 1878, provides:

“That the Postmaster General be, and he
 “is hereby, authorized and directed to read-
 “just the compensation to be paid from and
 “after the first day of July, eighteen hun-
 “dred and seventy-eight, for transportation
 “of mails, on railroad routes by reducing the
 “compensation to all railroad companies for
 “the transportation of mails five per centum
 “per annum from the rates for the transpor-
 “tation of mails on the basis of the average
 “weight fixed and allowed by the first section
 “of the act approved July 12, 1876.”

The argument under the act of July 12, 1876, is equally applicable here, but it may be strengthened by noting the difference between the language of that act and the act now under consideration.

It will be remembered that the act of July 12, 1876, provided for a reduction of—

“ten per centum per annum from the rates
“fixed and allowed by the first section ‘of the
“act’ approved March third, eighteen hun-
“dred and seventy-three, for the transporta-
“tion of mails on the basis of the average
“weight.”

The act of June 17, 1878, provides for a reduction of—

“five per centum per annum from the rates
“for the transportation of mails on the basis
“of the average weight fixed and allowed by
“the first section” of the act of July 12, 1876.

In the one act, therefore, we have Congress referring to the rates as “fixed and allowed” by law, and in the other to the basis of pay as “fixed and allowed by law.” This language is in harmony with the declared intention of Congress, in the above-mentioned land-grant acts, to fix by law “the price” to be paid to the railroad companies for the transportation of the mails. This price could not be fixed by law, unless Congress fixed both the rates and the basis upon which they were to be computed. It was the fixing of this price by

law (by the act of March 3, 1873) that enabled Congress thereafter to regulate the compensation to be paid to the railroad companies for the transportation of the mails by simply increasing or reducing the rates a certain per centum from time to time, as in its discretion and wisdom might be necessary.

The mail-carrying railroad companies were receiving compensation at a rate, fixed by Congress, of so much per mile per annum, as determined upon the basis of pay herein contended for on behalf of the claimant and other railroad companies, when Congress, by the act of July 12, 1876, reduced their compensation 10 per centum. They were receiving compensation at the same rate fixed by Congress, less the per centum per annum, as determined upon the same basis, when Congress by the act of June 17, 1878, made a further reduction of their compensation of five per centum per annum.

The act of June 17, 1878, must, therefore, be taken as another legislative affirmance by Congress of the interpretation given to the act of March 3, 1873, and as utterly inconsistent with the validity of said Order 412.

Act of Congress Approved March 3, 1905.

The act of March 3, 1905, provides:

“That hereafter before making the readjustment of pay for transportation of mails

on railroad routes, the average weight shall be ascertained by the actual weighing of the mails for such a number of successive working days not less than ninety, at such times after June thirtieth, nineteen hundred and five, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

This act, it will be observed, changes the weighing period from "not less than thirty," as stated in the act of March 3, 1873, to "not less than ninety" days.

It will be recalled that at the time this act was passed, Congress had had its attention especially called to the method employed by the Post Office Department of ascertaining the average daily weight of mails as a basis of pay. Postmaster General's Order No. 44, dated September 18, 1884, in effect the same as said Orders Nos. 165 and 412, had been submitted by the Postmaster General to the Attorney General of the United States for his opinion thereon. In the letter of October 22, 1884, transmitting said order to the Attorney General, the Postmaster General explained in detail the practice of the Post Office Department in ascertaining the average daily weight of mails carried as a basis of pay. The practice or method of ascertaining the average daily weight at that time was the practice or method which had prevailed ever

since the year 1867. In said letter the Postmaster General quoted the rates and method of ascertaining the average weight, as stated in the first section of the act of March 3, 1873. He then gave illustrations of the practice of the Department, and said:

“I have thought it necessary to give the foregoing illustrations in order that the practice of this Department under the law cited may readily appear, and I will thank you to advise me whether that practice is in compliance with or in violation of the statute. If not in conformity with the law will you please indicate the correct method by which the average weight per day should be obtained and the compensation adjusted thereon.”

In his reply of October 31, 1884, the acting Attorney General advised that the said practice was—

“correct, and that a departure from it would defeat the intention of the law and cause no little embarrassment.”

Because of this opinion said Order 44 was revoked January 16, 1885, without having been put into effect. Immediately thereafter and on January 21, 1885, in compliance with Senate Resolution of January 19, 1885, the Postmaster General transmitted to the Senate a letter giving a documentary history of the railway mail service and an explanation of the system of weighing the mails

and of computing the average daily weights. He therein said:

“Some little controversy at one time existed as to the justice of the present methods of obtaining the average daily weight to be taken as a basis for determining the annual pay, but a little examination made it clear that no other way of proceeding could be so just as that now in vogue.

* * * * *

“The present rule is, on those roads carrying the mails six times a week, to weigh the mails on thirty consecutive days on which the mails are carried, which would cover a period of thirty-five days; dividing the aggregate thirty weighings by thirty will give the daily average. On those roads carrying the mails seven times per week, the weighing is done for thirty-five consecutive days (including Sundays) and the aggregate divided by thirty for a basis of pay.

“It is evident that the period during which the weighing is continued covers, in both cases, all the mails carried for thirty-five days. If, in the second case, we should take our basis from an average obtained by dividing the aggregate weight by thirty-five we should commit the absurdity of putting a premium upon inefficiency, for evidently if the Sunday train were cut off we should virtually have the same mails less frequently carried, and therefore with a higher daily average, and therefore a higher pay basis than in the case where the seventh train was

run and the greater accommodation rendered.

"The present method gives no additional pay for the additional seventh train, but the other method would cause a reduction on account of better service, and practically would operate as a fine on all those roads carrying the mails daily, and including Sunday." (Senate Ex. Doc. 40, 48th Congress, 2d session; Record, pp. 42, 43.)

The method explained in said letter, of ascertaining the average daily weight of mails carried as a basis of railway mail pay, was the method which had prevailed continuously from the year 1867 down to the date of said letter. With the fact thus brought specifically to the attention of Congress, that this method had been construed to be the meaning of Congress, as expressed in the act of March 3, 1873, and the subsequent acts upon the subject by those charged with their administration, it cannot be doubted that Congress in passing the act of March 3, 1905, intended to, and actually did, ratify, confirm and approve that construction. This act changes neither the rates nor the basis of pay, but contains the same provision with reference to said basis as that embodied in the act of March 3, 1878, and in every statute on the subject since, namely, that—

"the average weight shall be ascertained by the actual weighing of the mails for such a

number of successive working days not less than ninety."

This act, therefore, is a distinct legislative affirmation of the construction given to the act of March 3, 1873, and is inconsistent with the validity of said Orders Nos. 165 and 412.

Act of Congress Approved March 2, 1907.

If under the preceding statutes any doubt could reasonably be said to exist as to the fact that Congress had fixed by law "the price" to be paid to the railroad companies for transporting the mails, by fixing both the rates and the method of ascertaining the average daily weight as a basis of pay, certainly no such doubt can be said to exist since the passage of the act of March 2, 1907.

At the second session of the Fifty-ninth Congress (the session during which this act was passed) the Committee of the House of Representatives inserted in this bill (which was H. R. 25483) the following provisions with reference to railway mail pay:

"The Postmaster General is hereby authorized and directed to readjust the compensation to be paid from and after the first day of July, nineteen hundred and seven, for the transportation of mails on railroad routes carrying their whole length an average weight of mails per day of upwards of five thousand pounds by making

"the following reductions from the present
 "rates per mile per annum for the trans-
 "portation of mails on such routes: On
 "routes carrying their whole length an av-
 "erage weight of mails per day of more than
 "five thousand pounds and less than forty-
 "eight thousand pounds, five per cent; forty-
 "eight thousand pounds and less than eighty
 "thousand pounds, ten per cent; and nine-
 "teen dollars additional for every addi-
 "tional two thousand pounds: Provided,
 "that hereafter the average weight per day
 "be ascertained, in every case, by the actual
 "weighing of the mails for such a number
 "of successive days, not less than one hun-
 "dred and five, at such times and not less
 "frequently than once in every four years,
 "and the result to be stated and verified in
 "such form and manner as the Postmaster
 "General may direct."

This proviso sought to change the basis of rail-
 way mail pay in exactly the same manner, and to
 the same extent, as that sought by said Orders Nos.
 165 and 412, but it was stricken out of the bill by
 Congress, and the basis of pay which had existed
 since 1867 inserted. The changes in the rates sug-
 gested in said bill, as reported, were also modified
 by Congress before it passed said bill. It will be
 observed that this proviso omitted the word "work-
 ing" from the phrase "working days," so as to
 require the Postmaster General to include Sun-
 days in the number of days to be used as the divisor

for ascertaining the average daily weight. The number of working days in the weighing period is ninety, and the total number of days, including Sundays, in said period is one hundred and five.

The accompanying report from the Committee on Post-Office and Post-Roads, and two minority reports, discussed the question very fully, and showed clearly the intention on the part of the committee to be that—

“In computing the average weight of mail
 “carried per day the whole number of days
 “such mail pay may be weighed shall be
 “used as the divisor.”

In reporting said bill (H. R. 25483) to the House on February 6, 1907, the chairman of said committee spoke at length of the history of the divisor theretofore used in ascertaining the average daily weight of the mails carried; of the conditions leading to its establishment; of said contemplated Order No. 44; and of the adverse opinion of the Attorney General on said order. After debate occupying parts of five days, the House, as above stated, rejected said provision by striking it out of the bill. Subsequently said provision was three times brought before the House, and each time it was rejected. The House refused to change the basis of pay upon which the compensation was to be determined according to certain specified rates, but reduced the rates a certain per centum, just as

it had done on two previous occasions, once by the act of July 12, 1876, and once by the act of June 17, 1878.

On February 20, 1907, while the House in Committee of the Whole was considering this bill, the following amendment (in effect the same as the provision which had been stricken out) was offered by Mr. Murdock, to follow the provision "For inland transportation by railroad routes, \$44,660,000:"

"Provided that no part of this sum shall
 "be expended in payment for transportation of the mails by railroad routes where
 "the average weight of mails per day has
 "been computed by the use of a divisor less
 "than the whole number of days such mails
 "have been weighed."

A point of order was made against this amendment on the ground that it changed existing law. The chair sustained the point, observing (41 Cong. Rec., 3741):

"The Chairman: The existing law has
 "received a construction by the officers
 "charged with the duty of administering it,
 "and that construction the chair feels bound
 "to follow. The proposed amendment
 "changes existing law as construed by the
 "proper officer by changing the divisor."

Upon appeal from the decision of the chair, its ruling was sustained (41 Cong. Rec., p. 3472).

Later, on the same day, the provision of the bill above quoted, including the said provision to change the divisor, went out upon a point of order (41 Cong. Rec., 3473). Thereafter, on the same day, the rules were suspended and the following provision changing the rates, and without the provision changing the divisor, was inserted in the bill, in which form it was passed and thereafter approved March 2, 1907:

“The Postmaster General is hereby authorized and directed to readjust the compensation to be paid from and after the first day of July, nineteen hundred and seven, for the transportation of mail on railroad routes carrying their whole length an average weight of mails per day of upward of five thousand pounds by making the following changes in the present rates per mile per annum for the transportation of mail on such routes, and hereafter the rates on such routes shall be as follows: On routes carrying their whole length an average weight of mail per day of more than five thousand pounds and less than forty-eight thousand pounds the rate shall be five per centum less than the present rate on all weight carried in excess of five thousand pounds; and on routes carrying their whole length an average weight of mail per day of more than forty-eight thousand pounds the rate shall be five per centum

"less than the present rates on all weight
 "carried in excess of five thousand pounds
 "up to forty-eight thousand pounds, and for
 "each additional two thousand pounds in
 "excess of forty-eight thousand pounds at
 "the rate of nineteen dollars and twenty-
 "four cents upon all roads other than land
 "grant roads, and upon all land-grant
 "roads the rate shall be seventeen dollars
 "and ten cents for each two thousand
 "pounds carried in excess of said forty-
 "eight thousand pounds."

As to how far the proceedings in Congress may be considered for the purpose of ascertaining the intention of Congress in passing any act, see *United States vs. Maye's Adm'r, etc.*, 12 Wall., 177; 20 L. Ed., on page 382; *Standard Oil Co. vs. United States*, 221 U. S., 1, 50; L. Ed., on page 641.

The action of Congress in passing this act was no more deliberate than its action in striking out the provision to change the divisor, and yet the Postmaster General on the very day that this act was approved, and in excess of his powers under the law, issued said Order No. 165, which was thereafter amended by said Order No. 412, making the identical change in the divisor which was sought to be made in the provision that was stricken out of the bill before it was passed. The passage of this act confirms the argument, above submitted, that Congress had fixed by law (ever since the act

of March 3, 1873) "the price" to be paid for railway mail service by fixing both the rates and the basis upon which they should be computed, so that it could thereafter regulate such pay simply by increasing or reducing the rates a certain per centum. It goes without saying, that the provision to change the divisor by increasing the number of days from ninety to one hundred and five, and which was stricken out of the bill, had for its object a reduction of the pay for performing railway mail service. If Congress had seen fit to reduce the railway mail pay by making this change in the divisor it could have done so, but it adopted the other and simpler method of merely reducing the rates. Surely, it cannot be seriously argued, much less maintained, that although Congress deliberately struck out of the bill, by which it reduced the railway mail pay, a provision to change the divisor, it yet meant thereafter to leave it to the discretion of the Postmaster General to make a further reduction of such pay by increasing the divisor to the same extent and in the same manner that it had refused to do in said bill. It must be presumed that Congress reduced the pay for transporting the mails as much as it thought was right and just to the mail-carrying railroad companies, for it might have increased the percentage of reduction had it thought proper to do so.

By the changes in the rates applying to weights

above 5,000 pounds per day Congress reduced the revenue of mail-carrying roads \$3,482,147.76 per annum, and it declared or decided that another large reduction, by changing the divisor, should not be superadded, notwithstanding which the Postmaster General undertakes to do by regulation the very thing Congress declined to do, and by Order 412 to make an additional reduction of nearly \$5,000,000 per annum.

Congressional Record, Vol. 42, Pt. 3, p. 2777.

Report 2d Asst. P. M. G. 1908, p. 9.

“ “ “ “ 1909, p. 8 and 9.

“ “ “ “ 1910, p. 9.

Hearings before Senate Committee on Post Offices and Post Roads, 63d Congress, 2d session, on H. R. 17042 and S. B. 6405, pages 46 and 47.

The cardinal rule in the interpretation of a statute is to determine the intention of the legislative body; all other canons of interpretation being but details of that.

Now upon consideration of the Congressional proceedings of 1907 to which we have referred, it will appear that these questions, and these only, so far as relates in any way to the divisor of mail weights, were before Congress.

(1) Did the existing divisor of weights do justice?

(2) Regardless of the comparative justice in theory of the existing divisor and of that which it was proposed to substitute, was the expedient method in reducing mail pay (*a*) to establish a new divisor or (*b*) to cut down, by percentage, the rates of pay which should apply to the computed weights. If these may be said to be distinct enquiries, they still were enquiries that led to the same action as regards the divisor, to-wit, the forbidding of any departure from the existing divisor and a declared reduction in pay by change of percentage.

The Court of Claims in the Alton case suggested that courts are governed by one rule in cases of actual legislation and another rule in cases of refusal to legislate. The matter presented in *United States vs. Alexander*, 12 Wall., 177, was a refusal to legislate. There is to be considered in the present case, however, not merely the reason for the refusal of Congress to establish a new divisor, but the reason of Congress in establishing new and reduced rates of pay and the reason and purpose were the same for the legislation here as for the non-legislation there.

The dominant fact is that Congress desired and enacted that whatever may have been the merits or demerits of the existing divisor with reference to conditions of days gone by, that divisor and none other should be employed in the future, and

pay should be reduced by a different method which was adopted.

We repeat that the objective of the legislation of 1907 was (1) to make reasonable and just reductions in pay for large mails, and (2) to make no reduction whatever with respect to small mails.

These ends could not be served by changing the method of computing the weights. There was no foreseeing the amount of the reduction which would be effected by a new divisor and a change in the divisor would affect the pay of all routes whether carrying large or small weights.

The matter with which this Court is concerned is not in any strict sense the interpretation of an ambiguous statute. On the face of the Act of 1907 there can be no possible doubt that the purpose of Congress was to reduce the pay of some (not all) mail routes by changing the rates which should apply and not in any other way, nor to reduce the pay at all of the smaller weight routes.

It will be observed that the act of March 2, 1907, does not authorize or direct the Postmaster General to readjust the compensation in any particular whatever, except "on railroad routes carrying their whole length an average weight of mails per day of five thousand pounds." It will be seen at once, therefore, that on all railroad routes carrying an average daily weight of mails of only five thousand pounds, or less, the compensation must

necessarily be determined according to the rates, and the basis of pay, as fixed by the preceding statutes; and any argument in favor of the validity of said orders Nos. 165 and 412, under the act of March 2, 1907, is obliged to assume that Congress intended to allow the basis of pay (which had prevailed since the year 1867) to remain fixed by law upon this latter class of railroad mail routes, and at the same time give to the Postmaster General the discretionary power to change the basis of pay upon the former class, thus making it possible for the Postmaster General to establish a basis of pay for the former class of railroad routes different from that established by law for the latter class. Such an intention on the part of Congress could never be seriously contended for, and so the Postmaster General, in issuing and enforcing orders Nos. 165 and 412, made no distinction between these two classes of railroad mail routes, but had them applied to all alike. It cannot be doubted that Congress, in passing the act of March 2, 1907, did not, and never intended to, give to the Postmaster General any authority or discretion to make any change in the method of ascertaining the average daily weight as a basis of pay, but that it merely changed the rates on certain routes, according to the average daily weight, to be ascertained just as it had been ever since the year 1867.

It will be observed further that this act does not

state that the rates, under the conditions named, "shall not exceed" a certain amount, but expressly provides that they "shall be" as therein set forth. It cannot be maintained that Congress meant to fix by law the rates to be paid on those railroad routes carrying their whole length an average daily weight of mails of more than five thousand pounds, and not likewise fix the rates to be paid on those routes carrying their whole length a smaller average daily weight. It is assumed that, since the passage of the act of March 2, 1907, it will not be contended that the Postmaster General has any authority to change the rates, but that the validity of said orders Nos. 165 and 412, depends solely upon the alleged authority of that official to change the basis of pay by changing the divisor. Congress, at the time it passed this act, had in mind the method of ascertaining the average daily weight which had prevailed since the year 1867 (a period of forty years), and intended the readjustment of the railway mail pay to be made on that same basis.

We have endeavored thus far to demonstrate that the Postmaster General as early as 1867 fixed upon the method of paying railroads for transporting the mails, and established the practice of paying the maximum amount for a service of six round trips per week, which service was at that time made uniformly applicable to all railroads and which service continues to this day. He

further adjusted the pay by ascertaining the daily average weight of mail, necessarily using the common divisor six in dividing the aggregate weight.

This practice the Postmaster General suggested and recommended be carried into law, which was done in the act of 1873, and that practice was uniformly sustained and adhered to in all subsequent legislation and by every administrative officer until the issuance of Order 412.

We think the demonstration sufficient to sustain our contention that Congress fixed the price to be paid this company, and it was beyond the power of the Postmaster General by Order 412 or otherwise to change the same.

By the legislation of 1876, 1878, 1905, and 1907, successively modifying in other parts the act of March 3, 1873, Congress adopted as a fixed feature of the law the method of computing weights that in said law and in the administration thereof had been uniformly practiced by the Department. When in performing the functions imposed upon them by the statute administrative officers have carefully pursued one practice during the more than forty years, and in that period there has been additional legislation at intervals of three, five, thirty-two and thirty-four years on the same general subject, but without mention of that particular function, that practice is adopted and incorporated into the legislation.

In *St. Louis, Iron Mountain and Southern Railway Co. vs. Craft*, 237 U. S., 548, Mr. Justice Vandevanter, in speaking for the court, said at pages 660-661:

“Following these decisions the amendment embodying the new section was proposed in Congress. In reporting upon it the Committees on the Judiciary in the Senate and House of Representatives referred at length to the opinions delivered in the two cases, to the absence from the original act of a provision for a survival of the employee’s right of action and to the presence of such a provision in the statutes of many of the States, and then recommended the adoption of the amendment, saying that the act should be made ‘as broad, as comprehensive, and as inclusive in its terms as any of the similar remedial statutes existing in any of the States, which are suspended in their operation by force of the Federal legislation upon the subject.’ Senate Report No. 432, 61st Cong., 2d Sess., pp. 12-15; House Report No. 513, 61st Cong., 2d Sess., pp. 3-6. While these reports cannot be taken as giving to the new section a meaning not fairly within its words, they persuasively show that it should not be narrowly or restrictively interpreted.”

In the *United States vs. Delaware and Hudson Co.*, 213 U. S., 366, at page 414, the court said:

"Certain it is, however, that in the legis-
 "lative progress of the clause in the Senate,
 "where the clause originated, an amendment
 "in specific terms, causing the clause to em-
 "brace stock ownership, was rejected, and
 "immediately upon such rejection an
 "amendment, expressly declaring that inter-
 "est, direct or indirect, was intended, among
 "other things, to embrace the prohibition of
 "carrying a commodity manufactured,
 "mined, produced, or owned by a corpora-
 "tion in which a railroad company was in-
 "terested as a stockholder, was also rejected.
 "1906, 40 Cong. Rec., Pt. 7, pp. 7012-7014.
 "And the considerations just stated we
 "think completely dispose of the contention
 "that stock ownership must have been in the
 "mind of Congress, and therefore must be
 "treated as though embraced within the evil
 "intended to be remedied, since it cannot in
 "reason be assumed that there is a duty to
 "extend the meaning of a statute beyond its
 "legal sense upon the theory that a provision
 "which was expressly excluded was intended
 "to be included. If it be that the mind of
 "Congress was fixed on the transportation
 "by a carrier of any commodity produced by
 "a corporation in which the carrier held
 "stock, then we think the failure to provide
 "for such a contingency in express language
 "gives rise to the implication that it was not
 "the purpose to include it."

In the case of *United States vs. Alexander*, 12
 Wall., 177, the court, in construing a pension act,
 said:

“The act of 1855 when first proposed, contained the following provision ‘and the pensions granted by this act and those under the said section of the act of February 3, 1853, shall commence on the 4th day of March, 1848.’ This provision was intended ‘to change the construction which the Commissioner of Pensions had given to the act of 1753 (30 Cong. Globe, 92), but it was stricken out, and the statute was enacted as it now stands. The intention of Congress was thus clearly manifested to adopt the construction of the act of 1853, which had been given to it by the Pension Bureau, and we are hardly at liberty to interpret it differently.’”

See also

- Valk vs. United States*, 28 Ct. Cls., 241.
United States vs. Falk Bros., 204 U. S., 143.
N. Y., N. H. & Hartford R. R. Co. vs. I. C. C.,
 200 U. S., 361.
Copper Queen Mining Co. vs. Arizona, 206
 U. S., 474, and
United States vs. Hermanis y Compania,
 209 U. S., 337.

In sustaining this point predicated thus far upon the plain reading of the law, we are further supported by the application of an elementary principle of statutory construction.

III.

Contemporaneous Construction.

Under our constitutional form of government it is the duty of the executive to execute or carry into effect the will of Congress as expressed in its various acts. It is not the duty, nor within the power of the executive to substitute its own will for that of Congress, nor in executing the duty placed upon them to ignore the purpose Congress had in mind.

If, therefore, Congress has made its intention clear, such intention constitutes the law, and is binding upon the executive and the judiciary.

“In all such cases it is held that the intent
“of the legislature, which is the test, was not
“to devolve a mere discretion, but to impose
“a positive and absolute duty.”

City of Galena vs. Amy, 5 Wall., 705.
U. S. vs. Thoman, 156 U. S., 353-9.

It has been our effort to show that the intention of Congress with respect to “the price to be paid for transporting the mail” was clearly and unequivocally expressed in the act of 1873, and left no discretion in the Postmaster General to either reduce or increase such price by the manipulation of the average daily weight of mails.

If we have been so unfortunate as to fail in this demonstration, these two elemental principles of

statutory construction, properly applied, bring us to the same result.

When a statute has received a contemporaneous construction by the Department called upon to administer it, and this construction had been continuous for a long time, such construction is treated as read into, and it becomes a part of the statute if not obviously wrong.

In *Komanda vs. United States*, 215 U. S., 392, the court said:

“Something can be said on both sides of
 “the question of similarity, and, if the case
 “turned simply upon that question, it might
 “be difficult to reach a satisfactory con-
 “clusion. In such a case the construction
 “given by the department charged with the
 “execution of the tariff act is entitled to
 “great weight. As said by Mr. Justice Mc-
 “Kenna delivering the opinion of the court
 “in *U. S. vs. Cerrecedo Hermanis y Com-
 “pania*, 209 U. S., 337-9: ‘We have said
 “when the meaning of a statute is doubtful,
 “great weight should be given to the con-
 “struction placed upon it by the department
 “charged with its execution (*Robertson vs.
 “Downing*, 124 U. S., 607; and *U. S. vs.
 “Healy*, 160 U. S., 136), and we have decided
 “that the re-enactment by Congress without
 “change of a statute which had previously
 “received long continued executive construc-
 “tion is an adoption by Congress of such
 “construction (*U. S. vs. Falk and Bros.*,
 “204 U. S., 143-152).’ ”

In *United States vs. Falk & Bros.*, 204 U. S., 143, the court held:

“The Attorney General having construed
 “the proviso of paragraph 50 of the act of
 “1890 as not restricted to the matter which
 “might precede it, but as of general applica-
 “tion, and that construction having been
 “followed by the executive officers charged
 “with the administration of the law, Con-
 “gress adopted the construction by the en-
 “actment of paragraph 33 of the act of
 “1897, and intended to make no other change
 “than to require as the basis of the duty the
 “weight of the merchandise at the time of
 “entry, instead of its weight at the time of
 “its withdrawal.”

In the case at bar the construction given to the act of March 3, 1873, and by those charged with its administration has prevailed ever since its passage. At the time the Postmaster General contemplated issuing Order No. 44, departing from that construction, the Attorney General of the United States in a written opinion advised him that the construction on which the postal authorities had been and were acting was correct, and that any departure from that construction would defeat the intention of the law (18 Atty. Gen. Op., 71).

In the case of *Allen vs. United States*, 26 Ct. Cls., 455, the court said:

“While the doctrine of estoppel might not
 “apply in this case as it did in the *Hartson*

“case (25 Ct. Cls., 451), the construction of
 “a statute by the officers of a department
 “intrusted with its execution and applica-
 “tion, and upon the faith of which em-
 “ployees and officers of the Government
 “have acted, is entitled to great weight and
 “consideration when such statute becomes
 “the subject of judicial construction.

““The construction given to a statute by
 “those charged with the duty of executing
 “it is always entitled to the most respectful
 “consideration, and ought not to be over-
 “ruled without cogent reasons. (Edwards
 “*vs. Darby*, 12 Wheat., 210; United States
 “*vs. the State Bank of North Carolina*, 6
 “Pet., 29; United States *vs. MacDaniel*, 7
 “Pet., 1.) The officers concerned are usually
 “able men and masters of the subject. Not
 “infrequently they are the draftsmen of the
 “laws they are afterwards called upon to in-
 “terpret (95 U. S., 763).

““The same principle was decided in this
 “court in Hahn’s case (14 C. Cls., 305), and
 “affirmed by the Supreme Court (107 U. S.,
 “402). Also in Alexander’s case (12 Wall.,
 “177, and 7 C. Cls., 205); Wright’s case (15
 “C. Cls., 87); Brown’s case (18 Ct. Cls.,
 “537), affirmed by the Supreme Court (113
 “U. S., 568), and Harrison’s case (20 Ct.
 “Cls., 122, and 21 Ct. Cls., 16).’ ”

In the case of *Sells vs. United States*, 36 Ct. Cls.,
 99, Mr. Chief Justice Peelle in delivering the
 opinion of the court said:

“If we were free to consider the construction of the statute, untrammelled by the long and uniform ruling of the department, we might reach a different conclusion, but the contemporaneous construction of the statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it is clear that such construction was erroneous” (citing several authorities).

In the case of *New York, New Haven and Hartford Railroad Co. vs. Interstate Commerce Commission*, 200 U. S., 361, at page 525, the court said while construing a statute which had theretofore been construed and acted upon by the Commission:

“Now, without at all intimating that, as an original question, we would concur in the view expressed in the case last cited, that to have applied the Act to Regulate Commerce, under proper rules and regulations for the segregation of the business of producing, selling and transporting, as presented in the *Haddock and Cox Bros. cases*, would have been confiscatory, and without reviewing the rulings made by the Interstate Commerce Commission, in those cases, and adhered to by that body during the many years which have followed those decisions, we concede that the interpretation given by the Commission in those cases to the Act to Regulate Commerce is now

“binding, and, as restricted to the precise
 “conditions which were passed on in the
 “cases referred to, must be applied to all
 “strictly identical cases in the future; at
 “least, until Congress has legislated on the
 “subject. We make this concession because
 “we think we are constrained to do so, in
 “consequence of the familiar rule that a
 “construction made by the body charged
 “with the enforcement of a statute, which
 “construction has long obtained in practical
 “execution, and has been impliedly sanc-
 “tioned by the re-enactment of the statute
 “without alteration in the particulars con-
 “strued, when not plainly erroneous, must
 “be treated as read into the statute.”

In case of *United States vs. Alabama Great Southern R. R. Co.*, 140 U. S., 621, the Court said:

“We think the contemporaneous construc-
 “tion thus given by the Executive Depart-
 “ment of the Government, and continued
 “for nine years through six different ad-
 “ministrations of that Department—a con-
 “struction which, though inconsistent with
 “the literalism of the act, certainly consorts
 “with the equities of the case—should be
 “considered as decisive in this suit.”

In *United States vs. Hammers*, 221 U. S., 220-228, the Court ruled:

“Conceding then that the statute is am-
 “biguous, we must turn as a help to its mean-
 “ing, indeed in such case, as determining its

“meaning, to the practice of the officers
 “whose duty it was to construe and adminis-
 “ter it. They may have been consulted as to
 “its provisions, may have suggested them,
 “indeed have written them. At any rate
 “their practice, almost coincident with its
 “enactment, and the rights which have been
 “acquired under the practice, make it de-
 “terminately persuasive.”

In *United States vs. Midwest Oil Co.*, 236 U. S.,
 459—472, the Court said:

“2. It may be argued that while these
 “facts and rulings prove a usage they do not
 “establish its validity. But Government is
 “a practical affair intended for practical
 “men. Both officers, law-makers and citi-
 “zens naturally adjust themselves to any
 “long-continued action of the Executive De-
 “partment—on the presumption that un-
 “authorized acts would not have been al-
 “lowed to be so often repeated as to crystal-
 “lize into a regular practice. That pre-
 “sumption is not reasoning in a circle but
 “the basis of a wise and quieting rule that
 “in determining the meaning of a statute or
 “the existence of a power, weight should be
 “given to the usage itself—even when the
 “validity of the practice is the subject of
 “investigation.

“This principle, recognized in every juris-
 “diction, was first applied by this Court in
 “the often cited case of *Stuart vs. Laird*,
 “1 Cranch, 299, 309. There, answering the
 “objection that the act of 1789 was uncon-
 “stitutional in so far as it gives circuit pow-

“ers to judges of the Supreme Court, it was
 “said (1803) that, ‘practice and acquiescence
 “under it for a period of several years, com-
 “mencing with the organization of the ju-
 “dicial system, afford an irresistible an-
 “swer, and has indeed fixed the construction.
 “It is a contemporary interpretation of the
 “most forcible nature. This practical ex-
 “position is too strong and obstinate to be
 “shaken or controlled.’

“Again in *McPherson vs. Blacker*, 146 U.
 “S., 1 (4), where the question was as to the
 “validity of a State law providing for the
 “appointment of presidential electors, it
 “was held that, if the terms of the provision
 “of the Constitution of the United States
 “left the question of the power in doubt, the
 “‘contemporaneous and continuous subse-
 “quent practical construction would be
 “‘treated as decisive.’ (36) *Fairbank vs.*
 “United States, 181 U. S., 307; *Cooley vs.*
 “Board of Wardens, 12 How., 315; *The*
 “*Laura*, 114 U. S., 415. See, also, *Grisar vs.*
 “*McDowell*, 6 Wall., 364, 381, where, in 1867,
 “the practice of the Executive Department
 “was referred to as evidence of the validity
 “of these orders making reservation of pub-
 “lic land, even when the practice was by no
 “means so general and extensive as it has
 “since become.”

These familiar and controlling decisions were not intended as disposing only of the immediate cases under consideration, but evidence a plainly stated and well-established principle of statutory construction. Their effect cannot be avoided by any

suggestion that the law is of doubtful meaning. It has no doubtful meaning if given the construction plainly expressed and immediately enforced by the executive of an established six-day divisor. It only becomes doubtful through the insistence of the Postmaster General to change the practice and system in force for forty years. The most that can be reasonably claimed through such an effort is to make what was always understood as clear, doubtful and uncertain, and in that case the above-cited opinions clearly and unequivocally establish the practice to be followed by this Court.

As stated by Mr. Justice Barney in stating the opinion of this court in the Chicago and Alton Mail divisor case :

“If there ever was a case of long-continued construction given an ambiguous statute (if such it may be called) both by Congress and the Department whose duty it was to administer it, this is one. The question has therefore advanced beyond the stage of an original one, and not being clearly erroneous must be upheld.”

If there remain any room to doubt whether Congress in enacting the proviso intended to convey any different meaning than that for which we here contend, we may then rely, as squarely supporting our contention, upon those well-recognized sources of information which may also be resorted

to for the purpose of discovering the meaning in cases where the language of the statute admits of more than one construction, namely:

The debates in Congress and the various amendments proposed during the progress thereof to the bill as originally introduced as a means of ascertaining the history of the period, the surrounding circumstances, and the defects which it was the object of the law to remedy;

The practical contemporaneous executive construction placed upon the language of the proviso by the administrative body to which the execution and enforcement of the act was expressly delegated, and long relied and acted upon by those for whose guidance it was promulgated;

The acquiescence of Congress in, and its acceptance of, the only executive construction of the proviso ever communicated to it.

The absence of any authoritative judicial construction whereby Congress could have been influenced; and,

The adoption by Congress of the construction placed upon the proviso by re-enacting without change the exact words of the statute which had previously received a long continued executive construction, and which had not received any authoritative judicial construction.

If notwithstanding the above stipulated definitions there still remains any doubt as to the meaning of the proviso, then, as this Court, through Mr. Justice Brewer, said in *Smith vs. Townsend*, 148 U. S., 390 (494) ; 37 L. Ed., 534:

“It is well settled that where the language
 “of a statute is in any manner ambiguous,
 “or the meaning doubtful, resort may be had
 “to the surrounding circumstances, the his-
 “tory of the times, and the defect or mischief
 “which the statute was intended to remedy.”

The rule that congressional debates may not be used as a means to an interpretation of an act of Congress is not violated by referring thereto for the purpose when the statute was adopted or as a means of determining conditions which the statute was designed to remedy, for, as was said in this Court in *Standard Oil Company vs. United States*, 221 U. S., 1 (50) ; 55 L. Ed., 619, (641) :

“Although debates may not be used as a
 “means for interpreting a statute * * *
 “that rule, in the nature of things, is not
 “violated by resorting to debates as a means
 “of ascertaining the environment at the time
 “of the enactment of a particular law; that
 “is the history of the period when it was
 “adopted.”

The rule announced in *Heath vs. Wallace*, 138 U. S., 573 ; 34 L. Ed., 1068, and followed by a long line of cases decided by this Court, provides :

“Moreover, if the question be considered
 “in a somewhat different light, viz., as the
 “contemporaneous construction of a statute
 “by those officers of the Government whose
 “duty it is to administer it, then the case
 “would seem to be brought within the rule
 “announced at a very early day in this Court
 “and reiterated in a very large number of
 “cases, that the construction given to a statute
 “by those charged with the execution of
 “it is always entitled to the most respectful
 “consideration and ought not to be over-
 “ruled without cogent reasons.”

The rule thus announced is reiterated in numerous cases, including:

Pennoyer vs. McConnoughy, 140 U. S., 125;
Brown vs. United States, 113 U. S., 568, 574;
U. S. vs. Moore, 95 U. S., 760;
U. S. vs. Ala. R. R. Co., 142 U. S., 616;
U. S. vs. Corecede, 209 U. S., 377.

In *Pennoyer vs. McConnoughy*, *supra*, the Court said:

“The principle that a contemporaneous
 “construction of a statute by the executive
 “officers of the Government, whose duty it is
 “to execute it, is entitled to great respect and
 “should ordinarily control the construction
 “of the statute by the courts, is so firmly im-
 “bedded in our jurisprudence that no author-
 “ities need be cited to support it. On the
 “faith of a construction thus adopted, rights
 “of property grow up, which ought not to

“be ruthlessly swept aside, unless some great
 “public measure, benefit or right is involved,
 “or unless the construction itself is mani-
 “festly incorrect.”

In *United States vs. Moore*, *supra*, this Court
 said:

“The construction given to a statute by
 “those charged with the duty of executing
 “it, is always entitled to the most respectful
 “consideration and ought not to be overruled
 “without cogent reasons (citing *Edwards*
 “*vs. Darby*, 12 Wheat., 210; *U. S. vs. Bank*,
 “6 Pet., 29; *U. S. vs. McDaniel*, 7 Pet.). The
 “officers concerned are usually able men,
 “and masters of the subject. Not infre-
 “quently they are the draftsmen of the laws
 “they are afterwards called upon to inter-
 “pret.”

In this case the membership of the commission
 was composed in part of eminent lawyers.

In *United States vs. Finnell*, 185 U. S., 236; 46
 L. Ed., 890, this Court, at page 244, said:

“Of course, if the departmental construc-
 “tion of the statute in question were ob-
 “viously or clearly wrong, it would be the
 “duty of the Court to so adjudge. * * *
 “But if there simply be a doubt as to the
 “soundness of that construction—and that
 “is the utmost that can be asserted by the
 “Government—the action during many
 “years of the department charged with the
 “execution of the statute should be re-
 “spected, and not overruled except for co-

“gent reasons. * * * Congress can enact such legislation as may be necessary to change the existing practice, if it deems that course conducive to the public interest.”

In *United States vs. Johnson*, 124 U. S., 236; 31 L. Ed., 389, it is said:

“In view of the foregoing facts the case comes fairly within the rule, often announced by this Court, that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous.”

To the same effect is *Brown vs. United States*, 113 U. S., 568; 28 L. Ed., 1080, wherein it is declared:

“It must be conceded that were the question a new one, the true construction of the section would be open to doubt. But the findings of the Court of Claims show that soon after the passage of the act the President and the Navy Department construed the section to include warrant as well as commissioned officers, and that they have since that time uniformly adhered to that construction, and that under its provisions large numbers of warrant officers have been retired. This contemporaneous

"and uniform interpretation is entitled to
 "weight in the construction of the law, and
 "in a case of doubt ought to turn the scale.
 "In *Edwards vs. Darby*, 12 Wheat., 206, it
 "was said by this Court that, 'in the con-
 "struction of a doubtful and ambiguous law
 "the contemporaneous construction of those
 "who were called upon to act under the law,
 "and were appointed to carry its provisions
 "into effect, is entitled to great respect.'
 "This case is cited upon this point with ap-
 "proval in *Atkins vs. Disintegrating Co.*, 18
 "Wall., 301; 21 Law. Ed., 84; *Smythe vs.*
 "*Fiske*, 23 Wall., 382; 23 Law. Ed., 49;
 "*U. S. vs. Pugh*, 99 U. S., 265; 25 Law. Ed.,
 "322, and in *U. S. vs. Moore*, 95 U. S., 763;
 "25 Law. Ed., 589. In the case last men-
 "tioned the Court said that 'the construction
 "given to a statute by those charged with the
 "duty of executing it ought not to be over-
 "ruled without cogent reasons. The officers
 "concerned are usually able men and mas-
 "ters of the subject. Not infrequently they
 "are the draftsmen of the laws they are
 "afterwards called upon to interpret.' And
 "in the case of *U. S. vs. Pugh* the Court said:
 "'While, therefore, the question, 'the con-
 "struction of the abandoned property act,'
 "is one by no means free from doubt, we are
 "not inclined to interfere at this date with
 "a rule which has been acted upon by the
 "Court of Claims and the executives for so
 "long a time' (citing cases). These author-
 "ities justify us in adhering to the construc-
 "tion of the law adopted by the Executive
 "Department of the Government and are con-
 "clusive against the contention of appellant

“that section 23 did not apply to warrant
“officers.”

That the position of counsel may not be misapprehended or misunderstood, we are not before this Court to contend for a moment that the judicial power does not extend to a sweeping obliteration of any contemporaneous or executive construction of a statute, or any part thereof. And the fact that such construction may have received the sanction of ages would not of itself defeat or lessen the dominion of courts over the interpretation and construction of statutes. That is a function, a prerogative, a power so inherent that it cannot be questioned. It is this very power which in time of stress not only gives protection to the citizen and subject, but also stability to the State.

Whether the construction of the proviso in question was in accord with the literalism thereof is not so much the question with us as is the fact that such views were contemporaneously pronounced by the body of experienced men to whom was committed the power to execute the law. If the advice and opinions of such men were not intended to be of prime importance and significance to all those subject to the operation of the law, then it is to be said that the Congress made a mistake in committing to them an authority so comprehensive and so vast.

Congress not only by refraining from amending

the act, but also by re-enacting the proviso without change, accepted a construction of the act with which it is impossible to reconcile the judgment under review, and which construction by the body possessed of full executive functions over the act became virtually the law of the land, and, until the institution of this suit, stood as a guide and protection to all persons embraced by the act.

We respectfully submit that we have thus far demonstrated:

1. The executive practice before 1873 of paying maximum compensation for a service of six round trips per week and establishing six round trips as the uniform contract service.

2. The similar practice prior to 1873 of weighing the mails and dividing the aggregate weights by a multiple of six.

3. Originally in 1873 adopting as law such uniform practice.

4. Legislation in 1875, 1876, 1878, 1905, and 1907 re-enacting the provisions of the act of 1873 with full knowledge of the executive practice thereunder.

5. Statutory construction making such executive practice the law.

We have, therefore, settled the question that this

claimant having agreed and contracted to carry the mail at such prices as Congress might fix, and Congress having fixed the same, it was, and still is, beyond the power of the Postmaster General to change it.

IV.

The Contract under the Distance Circular.

The distance circular sent the company February 12, 1907, which it was requested to fill out, execute, and return, contained an agreement clause reading:

“The company named below agrees to
“accept and perform mail service upon the
“conditions prescribed by law and the regu-
“lations of the department applicable to
“railroad mail service.”

Accompanying this distance circular was a notice that the mails would be weighed on said routes, commencing February 19, 1907,

“for the purpose of obtaining data upon
“which the Department may adjust the pay
“for mail service on the route (in accord-
“ance with the several acts of Congress
“governing the same), from July 1, 1907,”
etc.

The above facts are set forth in finding XI of the Court of Claims, and it is therein further shown that in returning said distance circulars

duly executed, the company advised the Postmaster General that service was not accepted if Order 412 was to be enforced. The letter of protest read in part:

“The contract in question obligates our
 “company ‘to accept and perform mail serv-
 “ice upon the conditions prescribed by law
 “and the regulations of the department ap-
 “plicable to railroad mail pay,’ and we
 “therefore beg leave to now formally advise
 “in submitting these distance circulars, that
 “the service involved is accepted, and our
 “company agrees to perform same with the
 “proviso that by thus subscribing and de-
 “livering these circulars to the Department
 “our company does not agree to submit to
 “any but lawful regulations by the depart-
 “ment and on this point our company does
 “not concede the power of the Postmaster
 “General, through an order or through any
 “other act of the Post Office Department to
 “provide for changing the method of ascer-
 “taining the daily average weight of mails
 “carried over the routes named on the dis-
 “tance circulars herewith, unless authorized
 “by proper congressional enactment. In
 “the view of our company there is no au-
 “thority whatever in existing legislation for
 “the aforesaid Orders 165 and 412, issued
 “March 2, 1907, and June 7, 1907, respect-
 “ively.

“The mails will be transported by our
 “company, of course, as required by public
 “necessity, pending settlement of the rights
 “of our company and of the United States

“in the question involved—*i. e.*, the matter
 “of ascertaining the average daily weights,
 “with the consequent annual compensation
 “for service performed over the routes
 “covered by the distance circulars herewith.
 “In addition to thus assuring the transpor-
 “tation of the mails as heretofore, by way
 “of adequately fulfilling the public necessi-
 “ties, we now record our company’s formal
 “refusal to accept the proposed method of
 “ascertaining the average daily weight of
 “mails carried, and fixing the annual rates
 “of pay as provided by the orders of the
 “Postmaster General heretofore described,
 “and our company also reserves all of its
 “rights in the premises to hereafter take
 “such action as may be found requisite to-
 “ward determining the legal method of as-
 “certaining the daily average weight of mail
 “carried over each route and the correct
 “and legal rates of compensation for the
 “services so rendered, in accord with the ex-
 “isting legislation which controls the mat-
 “ters involved.”

To this very precise and definite statement the
 Second Assistant Postmaster General replied:

“I have to advise you that the Depart-
 “ment will not enter into contract with any
 “railroad company by which it may be ex-
 “cepted from the operation or effect of any
 “postal law or regulation, and it must be
 “understood that in the performance of
 “service, from the beginning of the contract
 “term above named, and during the con-

“tinuance of such performance of service,
 “your company will be subject, as in the
 “past, to all the postal laws and regulations
 “which are now or may be applicable during
 “the term of this service.”

This correspondence shows that upon one point and one point only did the minds of the contracting parties fail to meet. Both agreed that the mails should be carried for four years in accordance with the law and the regulations of the department applicable to railroad mail service, but whilst the Postmaster General contended that Order 412 was in accord with law, the company insisted it was not and claimed the right to test that question in court.

The entire question therefore reverts to the original proposition—Was Order 412 lawful and within the power of the Postmaster General to enforce?

In the first place, it may be said that the expression “regulations of the Department” means “lawful regulations,” for an order or regulation which is contrary to law is null and void *ab initio*.

Morrell, *vs.* Jones, 106 U. S., 466.

United States *vs.* Eaton, 144 U. S., 677.

United States *vs.* Williamson, 207 U. S., 425.

The “conditions prescribed by law” constitute a part of the contractual relations between the

United States and the company and it is not necessary to consider all the conditions prescribed by law, but only such as Order 412 is in conflict with.

This order dealt entirely and solely with the method of ascertaining the average weight of mail. It had nothing to do with the maximum or minimum rate of pay. In order therefore to test its legality we cannot look to any discretion which may or may not be lodged in the Postmaster General as to the rate of pay, but must be guided entirely by the statutory method of fixing and ascertaining the average weight of mail. That method has been so fully argued hereinabove as not to require elaboration here.

It is sufficient to say that the terms under which service was to be performed were to apply, according to the Postmaster General,

“from the beginning of the contract term.”

It follows that the Postmaster General meant and intended the company to understand that there was a contract in existence and that it must be carried out in conformity with the law. If the law fixed the divisor, then the contract contemplated such a division. If the law did not fix the divisor, and it was subject to change from time to time by order or regulation, then the divisor fixed by the order must be used. There was, then, a contract agreed to by both parties and the only question is

whether the law or the order fixed the divisor. If fixed by order there is an end of appellant's case so far as this phase is concerned, but if fixed by law, then the mail has been carried according to law and the lawful regulations, as the contract provided, and that is determinative of the case in appellant's favor.

Having, as we believe, already established that the divisor was fixed by law prior to the issuance of Order 412, it naturally follows that the order is null and void and should be set aside.

V.

The Implied Contract.

Should it be held, however, that the minds of the contracting parties did not meet, sufficiently to justify a holding that the distance circulars, signed in 1907, in connection with the subsequent communications, constituted a binding contract, it will then be necessary to find the true terms and conditions under which the service was rendered.

In the absence of some express agreement the Postmaster General has since 1867 held himself obligated to pay the maximum rate fixed by law for the minimum service of six round trips per week.

One fact stands out pre-eminent, to wit: there was never any agreement or understanding that the pay was to be governed by Order 412.

Neither can it be said there was any bargaining about the amount of compensation to be paid. It was recognized that the law, properly interpreted, fixed that. The situation is therefore precisely similar to that considered by this court in *Chicago, Milwaukee & St. Paul Ry. Co. vs. United States* (104 U. S., 680-687).

“Of course if it was not the intention of
 “the acts of Congress referred to, to affect
 “the contracts of the company, the erroneous
 “interpretation of them by the Postmaster
 “General, and his action under it, cannot
 “give to them any different effect, *for the*
 “*rights of the parties depend upon the law*
 “*itself*. And the performance by the com-
 “pany of the service required by its contract,
 “notwithstanding the notice of the intended
 “reduction of compensation by the Post-
 “master General, cannot be construed as a
 “waiver of its rights or an acquiescence in
 “new proposals and that whether it had pro-
 “tested against the erroneous construction
 “of the law or not. For it had no option.
 “It was bound by its contract to perform
 “the service, and its performance was de-
 “manded. It was not in a position abso-
 “lutely to refuse to carry the mails, for it
 “was bound to carry them, if offered, on
 “some terms, *either prescribed by law or*
 “*fixed by contract*, and it had the right to do
 “so, without prejudice to its lawful claims,
 “leaving the ultimate right to future and
 “final decision. It was not the case of a
 “voluntary payment of an illegal exaction,
 “where the maxim, *consensus tollet er-*

“*rorcm*, prevents a recovery, because in such case, there is the legal presumption of an abandonment of the claims. *Volenti non fit injuria*. But here the service was to be performed, at all events, just as it was performed, but under which of two claims was under dispute. Its performance was a condition of both, and cannot, therefore, be a bar to either.”

It is equally true in this case that the service was to be performed, but under which of two claims, regarding compensation due, was in dispute. Here, as in the case cited, performance was a condition of both claims for compensation.

There is no dispute but that it was entirely competent for the Postmaster General to contract at rates less than the statutory maxima. But this case shows a specific offer upon the part of the Postmaster General to pay the maximum rates provided by law, an expressed willingness of the company to perform service at such rates and a continuing uninterrupted practice from 1873 to date to pay such maximum rates for the fixed service of six round trips per week.

Under such circumstances the United States became obligated to pay what the service was reasonably worth, and the statutes hereinbefore referred to and the uniform practice of the Department for over forty years in applying them to furnish the necessary guide for a determination as to that fact.

The language of the law fixes what reasonable compensation is, and such compensation must control unless the Postmaster General is able, by specific contracts, to procure service for a lesser sum. For many years prior to 1907, this company had been rendering the identical service called for in this case and had been paid upon the basis of rates specified in the law which, as said in *Eastern R. R. Co., 20 Ct. of Cl., 23.*

“whilst they did not establish an absolute
 “rate of compensation necessarily alike to
 “all railroads, for mail transportation, fixes
 “the maximums which are not to be ex-
 “ceeded, leaving the Postmaster General a
 “discretion to make contracts at less rates if
 “he should be able to do so. * * * The
 “implied compensation was the reasonable
 “worth of the service, *and that might be*
 “*measured by the previous dealings of the*
 “*parties for like service in the statutes*
 “*regulating the same. The maximum rate*
 “*fixed by statute would no doubt be consid-*
 “*ered the reasonable and implied compensa-*
 “*tion until the Postmaster General should*
 “*make other terms, with the concurrence,*
 “*express or implied, of the claimant.*”

It was further held in *Jacksonville, Pensacola & Mobile Co. vs. United States* (118 U. S., 626):

Where companies

“perform service without express contract,
 “their compensation depends wholly upon
 “implied contracts to be inferred from and

“interpreted by the general laws of Congress, and the regulations, orders and practices of the Post Office Department and other attending circumstances as in the Eastern R. R. case, before cited.”

Lord Watson, in *Manchester, Sheffield, & C., Ry. vs. Brown*, L. R. 8, Appeal Cases, 715, said:

“*Prima facie* I am prepared to hold that “a rate sanctioned by the legislature must “be taken to be a reasonable rate.”

In *Great Western Ry. Co. vs. McCarthy*, L. R. 12, Appeal Cases, 218-235, it was said:

“A rate sanctioned by Act of Parliament “is a legal rate, which the company can “exact from all who employ them to carry, “unless they have disabled themselves from “making the change by conceding terms “duly favorable to some of their customers. “Until it is shown that they cannot law- “fully charge the statutory rate, it must, in “my opinion, be regarded not only as law- “ful, but as reasonable.”

See also

Jenkins vs. Nat'l Asso'n, 111 Georgia, 734.
Thompson vs. Sanborn, 52 Michigan, 141.

To this we must add the uninterrupted practice of our forty years, and still continued by the Departments administering the postal laws, of

always, in the absense of some express agreement to the contrary, paying the maximum rate fixed by law. This must evidence its reasonableness, not only because Congress has changed it from time to time to meet changed conditions, but also because it will not be presumed that every Postmaster General from 1867 to the present time has been paying an unlawful or unreasonably high rate for carrying the mail.

Finding IV (Record, p. 33) specifically finds:

“From and after 1873 and until Order
 “412 became effective, it was the practice of
 “the Postmaster General, when computing
 “the compensation payable to railroad car-
 “riers for service to be performed in trans-
 “porting the mails over the several routes,
 “to apply to the quotient obtained as above
 “set forth, or by the act of 1905, which in-
 “creased the minimum weighing days, *the*
 “*maximum rate allowed by statute*, except
 “in cases,” etc., not covering any class of
 service involved in this case.

Finding V also holds (Record, p. 34):

“In administering the provisions of said
 “acts of 1876 and 1878, and in making the
 “reductions therein specified, the Postmas-
 “ter General *started with the maximum*
 “*rates of pay* allowed by the act of 1873,
 “and the *pro rata maxima* prescribed by the
 “Department for intermediate weights,
 “and reduced the rates in accordance with
 “said acts. The maximum rates taken in

"connection with the averages found as
 "stated, and the mileage involved, fur-
 "nished the amount of the annual compen-
 "sation."

In an opinion of January 20, 1876, the Assistant Attorney General for the Post Office Department held:

"When a service is performed in full
 "compliance with the terms and conditions
 "of the act it would entitle the company per-
 "forming it to the maximum rate of com-
 "pensation therein provided; but a service
 "performed meeting partially only the con-
 "ditions and terms of the act would be en-
 "titled only to a rate of compensation pro-
 "portioned to its incomplete character."
 (Opinions, Vol. 1, p. 214.)

Under the authorities quoted and the Findings of the Court, we have as a guide to the fixing of a fair, reasonable and lawful compensation (1), the act of March 3, 1873 "authorizing and directing" the Postmaster General to thereafter pay not to exceed the rates named in the law.

(2) The act of July 12, 1876, authorizing and directing the Postmaster General to readjust the compensation to be paid by reducing the amounts theretofore fixed by law ten per centum.

(3) The act of June 17, 1878, authorizing and

directing the Postmaster General to further reduce the compensation five per centum.

(4) The act of March 2, 1907, authorizing and directing the Postmaster General to reduce the compensation on railroad routes carrying a daily average of 5,000 pounds or more.

(5) The uniform practice of the Postmaster General for over forty years of paying the maximum amount authorized by law for the minimum service of six round trips per week.

Surely under such conditions it is fairly contended that the company is entitled to receive the compensation so fixed by law and uniformly paid for similar service.

VI.

The Application of a Seven-day Divisor to a Six-day Service is Arbitrary, Unjust, and Contrary to Law.

The Postmaster General requests of all companies a six-day service, and on many routes the mail is only carried six days in the week. The entire weighing period is 105 days, during which these six-day routes carry the mail only 90 days. Notwithstanding this fact, under Order 412 the daily average is reached by dividing the total

weight carried by 105 and the absolutely inaccurate and unjust daily average is arrived at in that way. A reading of the acts of 1873 and 1905 will demonstrate that such a method of adjustment was not only never contemplated but never authorized. There is no semblance or pretense of accuracy or fairness in thus arbitrarily stating a false conclusion.

In the previous discussion of this case counsel for the United States have admitted that the meaning of the act of 1873 was not free from doubt; that literally followed it called for a mathematical divisor, but that in the exercise of a broad discretion resting in him the Postmaster General had construed it otherwise and originally adopted the divisor 30. Under Order 412 the Postmaster General not only departs still further from mathematical accuracy, and as applied to over 1,300 mail routes carrying no mail on Sunday, fixes an arbitrary and absurd divisor. If he weighed the mails for 313 days when they were actually carried and divided the total by 313, he would obtain the exact result intended by the law, but to divide the total by 365 is a clear violation of the plain terms of the law. By so doing he charges the six-day routes with carrying the mail on Sunday and punishes them for not doing it, although it is with his consent and agreement that service shall be for only six days a week.

If there were nothing else in this case but the routes carrying mail six days per week, we are sure this Court would not sanction or approve of Order 412, under which the weight of mail carried 90 days is divided by 105 to ascertain the average daily weight. Manifestly it does nothing of the kind and therefore is a plain violation of the law, which intended such daily average to be at least approximately correct and to result in each company receiving, as far as practicable, a proportionate and just rate of compensation, according to the service performed.

VII.

The Discretion of the Postmaster General.

In all the previous discussions of these cases and particularly in the opinions of the Court of Claims, Order 412 has been sustained as the reasonable exercise of a discretionary power resting on the Postmaster General, and it has been seriously and continuously argued, that there is nothing in any of the acts of Congress fixing mail pay to detract from or destroy that discretion.

To all this it is sufficient to say that the Postmaster General has all the discretion he had prior to the act of 1873, but that under no reasonable construction of the law can it be said that his discretion was thereby broadened.

Prior to 1873 the Postmaster General was dealing with a lot of independent companies, who were free to contract for the carrying of the mails upon such terms as might be mutually agreed upon. The Postmaster General could contract with them for compensation within the maximum specified in the law. He can still do that. But after 1873 Congress directed the Postmaster General to rearrange pay, having in the meantime burdened land-grant roads with the agreement to carry the mail at such rates as Congress might prescribe. Whilst, therefore the Postmaster General might then or now contract with those carriers for any amount within the legal maximum, in the absence of such special contract the price fixed by Congress must control.

The Postmaster General has now the same discretionary power he had before 1873 to contract with each company, but a contract to perform service "according to law and the regulations" presupposes a statutory rate which must be paid.

The only difference therefore in the matter of discretion, existing prior to 1873 and since, is that land-grant roads were taken out of the class of carriers who might decline to carry the mails if the terms offered were not satisfactory. As to these and all other carriers the Postmaster General has now, as he had prior to 1873, full discretion to contract for service within the maximum rates fixed by law. The only difference is that should he fail

to make such special separate contracts, then, as to land-grant roads, they must carry the mails "at such prices as Congress may by law provide."

Reference in this particular has been made to the act of July 28, 1916, requiring all railroads to carry the mail, but it is well to note the language of that act, making it unlawful to refuse to perform service

"at the rates or methods of compensation
"provided by law."

Conclusion.

As to this company, it was agreed between it and Congress in the act of July 2, 1864, that the company would carry the mails

"at such prices as Congress may by law provide and until such price is fixed by law the
"Postmaster General shall have the power
"to fix the rate of compensation."

Congress has by the acts of 1873, 1876, 1878, and 1907, fixed the price to be paid, and the Postmaster General has not the power to change the same. Excepting as it has placed this company, as a land-grant road, in the class of carriers obligated to carry the mail, Congress has not interfered with the free discretion of the Postmaster General to specially contract with any company within the

legal maximum, but, in the absence of such special contract, the company obligated to and carrying the mail is entitled to the price fixed by law.

Congress has never provided for a Sunday service; the Postmaster General has never contracted for Sunday service; the railroads have never agreed to furnish Sunday service, and six round trips per week have, from 1873 to this day, been considered by all parties as the understood contractual service, entitling the companies, in the absence of an express agreement to the contrary, to the maximum compensation provided by law.

There never have been six-day or seven-day routes. They are all six-day routes because the Department has itself consistently called for six round trips per week. Service on Sunday, therefore, is exactly the same as extra service by several trains a day, purely voluntary, outside the contract or demands of the Department and not to be taken as the means of punishing the carrier through a reduction of pay for such improved and increased service.

If all this can be ignored and the case disposed of under the theory of an unlimited discretion resting in the Postmaster General, then all the extended hearings and reports on railway mail pay and resulting legislation may be ignored as a total waste of time and money, because the Postmaster General is in exactly the same position he was be-

fore they were considered or passed, and can, in the exercise of his discretion, do everything Congress has attempted to do and some things Congress has expressly refused to do.

Respectfully submitted,

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Counsel for Appellant.

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Taking first the group to be readjusted in 1907, on February 12, 1907, the Postmaster General notified appellant that direction had been given to weigh the mails on these routes "for the purpose of obtaining data upon which the department may adjust the pay for mail service * * * from July 1, 1907."

This notice set out that the weighings would be in accordance with Order No. 412, which recited as follows:

ORDER No. 412.—Ordered that Order No. 165, dated March 2, 1907, be, and the same is hereby, amended to read as follows:

"That when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day."

This notice also was accompanied by the usual distance circular, which appellant was requested to fill out with specific information called for, and return to the department. This circular contained what was commonly called the "agreement clause" (also called "acceptance clause"). (Finding XI, R. 40.)

Appellant returned the executed distance circular with the agreement clause signed, but with an "exception" to orders No. 165 and No. 412 attached thereto. Accompanying the distance circular was a letter more specifically objecting to the terms of said orders. The Second Assistant Postmaster General replied by letter to the appellant, stating that, notwithstanding the "exception," the department would not enter into any contract with any railroad com-

pany by which it may be excepted from the operation or effect of any postal law or regulation. The mails were thereafter duly weighed, the computations of the average daily weights completed on the basis of the terms of Order No. 412, and the maximum rates provided by statute applied thereto. Orders were made stating the compensation which would be paid, and notice thereof was given to appellant. (Finding XI, R. 41, 42, 43.)

The appellant carried the mails thereafter, and during the term, without further protest or objection.

When the quadrennial term for this group of routes was about to end on June 30, 1911, the same method was pursued by the department. The distance circular was again sent out with a notice regarding the weighing to secure data for the new term beginning July 1, 1911, and there was inserted in it specific mention of the Postmaster General's Order No. 412. The terms of the order were quoted. On June 27, 1911, the department, not having received back the distance circulars, called appellant's attention thereto and informed it that in the meantime the service would continue, subject, as in the past, to all applicable postal laws and regulations. (Finding XI, R. 43.)

The appellant on July 5, 1911, returned the distance circulars with the agreement clause signed but with the same "exception" to Order No. 412 as in 1907. This exception was also set out in an accompanying letter. To this the Second Assistant Postmaster General replied, on July 12, 1911, in the same

summer of 1907. To this the appellant replied, on July 24, 1911, to the effect that the signed distance circular constituted a contract with the United States, under which the company may be expected to perform service, etc. The Second Assistant Postmaster General replied, on July 24, 1911, that the filing of the distance circular with the agreement there modified did not constitute a contract with the United States and that the department would not enter into any contract by which the railroad company might be exempted from the operation or effect of any postal law or regulation or order of the Postmaster General. In reply to this, appellant wrote the Second Assistant Postmaster General, on July 25, 1911, that, inasmuch as the filing of the distance circular constituted the only contract to which it had assented, it would be pleased to receive advice as to the conditions under which the mail was to be transported during the guaranteed term, stating that the company did not consent to transportation under Order No. 214. On July 26, 1911, the Second Assistant Postmaster General replied to the effect that appellant's disposition appeared to be directed against Order No. 214, which had been declared to be legal, had become the uniform practice of the Department, and had been applied to all weightage rates by promulgation; that the compensation would be thereafter fixed in accordance with the terms of said order, as the maximum allowed by the Postmaster General under the law and regulations; and that if the company performed the service it would not be paid more than the rate

of compensation caused in said adjustment orders. (Finding XI, R. 81, 84, 85.)

Thereafter the mails were duly weighed and the average daily weights were ascertained in accordance with the terms of order No. 811. The maximum rates provided by the statute were applied thereto and the usual orders were made stating the precise sums which could be paid for the services contemplated. Appellant was notified thereof (Finding XI, R. 86), and continued to carry the mails for the quadrennial term and to receive the amounts provided without further objection or protest.

Before the end of the quadrennial term, on June 26, 1916, the Second Assistant Postmaster General, on February 11, 1916, sent the appellant usual distance circular with the same character of notice with reference to the weighing of the mails for this same group of routes. On June 23, 1916, appellant returned the distance circular with the agreement clause signed but with an "exception" to order No. 811, and the statement that the company could not accept as full compensation payment based upon a daily average as computed. To this the Second Assistant Postmaster General, on June 26, 1916, replied in the same sense as to 1911. (Finding XI, R. 86, 87.)

The mails were thereafter weighed, the average daily weights were ascertained in accordance with the terms of order No. 811, the pay was fixed on letters and notices was given thereof in the same sense as to 1911. (Finding XI, R. 88.)

Appellant carried the mails and received the compensation as fixed during the quadrennial term without further objection or protest.

With respect to the second group of routes, the first readjustment term under consideration began July 1, 1900. The following suggestions were laid:

The Postmaster General, on February 4, 1900, notified appellant that instructions have been given to weigh the mails for the same purposes as stated with reference to the other group of routes. His notice contained the same reference to order No. 222. It was accompanied by the usual form of distance circular. The department not having received back the distance circular on June 24, 1900, notified appellant of that fact and stated that in the meantime the service would continue subject, as in the past, to the postal laws and regulations applicable thereto. (Finding 12, R. 66, 67.)

Thereafter, on July 22, 1900, appellant returned the completed distance circular with the suggested change agreed and accepted noted to orders No. 222 and No. 224. They were accompanied by a letter referring to the protest. On July 2, 1901, the Second Assistant Postmaster General replied by letter to the same terms used as to the other group of routes heretofore mentioned. Thereafter the mails were weighed, the average daily weight was ascertained in accordance with the terms of order No. 222, the maximum rate of pay was applied thereon, and as order two made being specific demands which would be paid to the service con-

completed. Notice thereof was sent to appellant. (Finding XI, R. 47.)

Before the expiration of this term on June 30, 1914, the Second Assistant Postmaster General, on February 9, 1914, sent appellant the same notification and distance circular as before and appellant returned the distance circular with the agreement clause signed but with the same exception. The Second Assistant Postmaster General replied to the protest on July 26, 1914, in the same language as before. Thereafter the mails were weighed, the average daily weights were ascertained in accordance with the General Order No. 412, the maximum rates fixed by the statute were applied thereto, and the pay for service was fixed accordingly and notice thereof was furnished appellant. (Finding XI, R. 47, 48.) Appellant carried the mails and received pay for service in accordance with the terms of said notice during the predetermined term without further protest or objection.

Appellant filed dissatisfied petition in the Court of Claims January 26, 1922 (R. 1-22), and a supplemented petition June 26, 1927 (R. 26, 26). The claim is for the recovery of \$310,313.85 as the difference between the pay received and that which might have been allowed had the Postmaster General applied the maximum rates permitted by the statute as average daily weights computed by using the rates prescribed in Order No. 412.

Appellant has received profits of mails from the United States and portions of its lines over which

mails are carried. (R. 26, 27, 28.) Of the seventy routes served by this appellant and involved in this suit, only five are wholly over land aided lines and eight others are over lines land-aided in part only. Fifty-seven of the routes here involved are over lines no part of which was in any way aided by the United States.

The general facts in this case are otherwise the same as those in the *New York Central* case, No. 133, in which appellee's principal brief has been filed.

The Court of Claims upon the evidence found the facts as stated. (R. 25-30.) It decided as a conclusion of law that the plaintiff was not entitled to recover, and dismissed its petition. (R. 50.)

ARGUMENT.

I.

The facts show that appellant carried the mails under an express contract, and its terms control appellant's rights.

From the foregoing statement it will be observed that as far as the question of protest is concerned the facts in this case differ from those in the case of the *New York Central and Hudson River Railroad Company*, No. 133, only in the extent to which the correspondence was carried. It will be noted that before the readjustment orders had been made the correspondence expressing these protests had ended, and that thereafter the Postmaster General made the readjustment orders in accordance with the terms of the statute and Order No. 412, fixing the pay of appellant, of which due notice was given, and that there-

after appellant carried the mails and received payment therefor without further objection or protest.

The legal status of the appellant, therefore, is substantially the same as in the last above-mentioned case. The terms of the Postmaster General's offer were stated by the readjustment order, of which appellant was duly advised. *The compensation was fixed by him at the maximum rate on the basis that average weights were ascertained as prescribed in Order 412.* The offer was accepted by carrying the mails as tendered thereafter. Under the authorities elsewhere cited, the terms of the contract which existed between the parties were so defined.

If it be held that there was not an actual meeting of minds, they were still the terms on which the service was performed, and measured the right and extent of compensation therefor.

Counsel for the Northern Pacific Co. argue that the relation of the parties was one of express contract. But they misconceive its nature and are so led into fundamental error. They state their contention with respect to the existence of a contract, on page 70 of their brief, as follows:

It follows that the Postmaster General meant and intended the company to understand that there was a contract in existence and that it must be carried out in conformity with the law. If the law fixed the divisor, then the contract contemplated such a divisor. If the law did not fix the divisor, and it was subject to change from time to time by order or regulation, then the divisor fixed by the

order must be used. There was, then, a contract agreed to by both parties and the only question is whether the law or the order fixed the divisor. If fixed by order there is an end of appellant's case so far as this phase is concerned, but if fixed by law, then the mail has been carried according to law and the lawful regulations, as the contract provided, and that is determinative of the case in appellant's favor.

This contention, therefore, is that there was an express contract, but that a term of it was the use of a particular divisor fixed by the law. The fallacy here involved is dealt with by us in the *New York Central Case*, but notice is again given to it here because this appellant reaches its conclusion by an entirely different process of reasoning from that adopted by the other appellants.

This process assumes that the law of 1845 fixed the rate to be paid but did not fix the basis upon which the rate should be computed, leaving that to the discretion of the Postmaster General; that in 1867 he "fixed the basis by determining that the maximum pay should be allowed for a service of six round trips a week," thereby exhausting the control of himself and his successors over the factors of due frequency and speed made discretionary by the law of 1845; and that the law of 1873 was intended to save the Postmaster General from the exercise of all discretionary power over rates, except as to purely administrative matters, and to fix the basis of pay as a service of six round trips a week.

This is said automatically to have fixed the divisor as composed of six days in the week.

This process of reasoning finds no basis in the terms of the act of 1845, in the practice thereunder, or in the facts concerning the adjustments. It is a theory constructed merely to meet the needs of such contention.

In the first place, the Postmaster General did not fix, in 1867, the basis of pay under the law of 1845 by determining that maximum pay should be allowed for a service of six round trips a week, and thereby render that factor no longer discretionary.

The act of 1845 provided for a division of the railroad routes "into three classes according to the size of the mails, the speed with which they are conveyed, and the importance of the service." It fixed maximum rates of \$300 per mile per annum for those of the first class, \$100 per mile per annum for those of the second class, and \$50 per mile per annum for those of the third class. Certain increases could be allowed for special conditions named in the act.

If, in 1867, the Postmaster General had "fixed the basis by determining that maximum pay should be allowed for a service of six round trips per week," definite evidence of it should be found in his reports and the adjustments published in them. There is not the slightest evidence in these sources of information to substantiate the assumption. On the contrary, there is ample evidence to disprove it.

For example, "Table E," appearing in the report for 1867 "shows the weight of mails and accommoda-

tions for mails and agents on railroad routes, with the frequency of the service and the rate of pay per mile per annum for mail transportation." (Report of Postmaster General for 1867, p. 72 *et seq.*) This table does not show actual readjustments made after the weighing of 1867, but it shows the rates of pay allowed on the several routes, the size of the mails, and facilities furnished (elements which entered into the determination of the classification).

Under the law the maximum rate of \$50 per mile per annum was permitted to be paid for service by routes of the lowest or third class. These are set forth beginning at the bottom of pages 78-79 and continuing upon pages 80-81, 82-83, and 84-85. If plaintiff's assumption be true, one should find that where any of these routes belonging in the third class performed service of six round trips per week the pay was \$50 per mile per annum. On pages 82-83 and 84-85 there are 32 routes at less than \$50 per mile per annum, ranging from \$47.77 down to \$8.33, although all but 3 were six times a week or more. Moreover, these three exceptions which performed service only three times a week received a higher rate of pay per mile per annum than five on which service was six times a week.

Again, under the statute a maximum rate of pay of \$100 per mile per annum was payable for service by routes of the intermediate or second class. These are set forth beginning on pages 74-75 and continuing on pages 76-77 and 78-79. If plaintiff were right, all these routes performed service of six round trips a

week, which should receive pay of \$100 per mile per annum. On the contrary, however, out of the 145 routes authorized under the statute to receive a maximum pay of \$100, 70 were paid at less than \$100 per mile per annum. They ranged from \$90 to \$51.12, although all gave a service six times a week or more.

The same conditions are found in the routes of the first class, where even a less percentage received the maximum pay.

Hence the contention that in 1867 the Postmaster General determined that maximum pay should be allowed for a service of six round trips a week is not only not proved by the records but is disproved thereby.

Again, the act of 1845 provided "*inter alia*" "That if it shall be found necessary to convey over any railroad route more than two mails daily, it shall be lawful for the Postmaster General to pay such additional compensation as he may think just and reasonable, having reference to the service performed and the maximum rate of allowance established by this act." This certainly did not fix a standard of six round trips a week, but rather would have justified a basis of 12 or 14. The fact is that a study of the tables showing pay and the elements entering into the determination of the classification of the routes under the Act of 1845 does not disclose a sufficiently intimate relation between rate of pay and frequency of service to reach any conclusion respecting the importance given that element.

The form of order basing the full measure of pay on a service of not less than six round trips a week is known as in use from about 1873. Assuming, for argument, that the same practice of stating the pay had been followed theretofore, plaintiff's interpretation of its meaning and significance is wholly erroneous. The law of 1873 named one of the conditions upon which the pay allowed by the act should be earned, i. e., that the mails should be carried with "due frequency and speed." What should constitute "due frequency" was a matter to be determined in the discretion of the Postmaster General. Most mail service at that time (especially that performed on star routes) was performed by six round trips a week. Such statement in the order of the minimum frequency in railroad service was nothing more than a gauge for the guidance of the paying officer and the auditor in checking up the amount of compensation payable under the orders fixing the pay.

But assuming for the sake of argument plaintiff's position that the Postmaster General in 1867 fixed the minimum frequency of service he would require for the full measure of pay, it can not be said that such exercise exhausted his discretion and converted, for the future, his option into a fixed and immutable condition of rate. There is nothing in the history of the service nor its necessities which suggests it. On the contrary, such a result would be against public interest, contrary to good service in its future development, and in derogation of the reasonable and necessary administrative discretion

of the Postmaster General. Furthermore, if the language of the act of 1845 reposed a discretion in the Postmaster General, as is admitted by plaintiff, the act of 1873 as clearly and definitely continued and conferred upon him that discretion. In fact, with respect to the particular point, the act of 1873 was more specific and definite, for it provided in terms that "due frequency" should be a condition of earning maximum pay, but omitted any attempt to declare or indicate what "due frequency" should be. It is a remarkable proposition that Congress should have assumed to unalterably fix by law a frequency of six or any other number of round trips as entitling the railroads to the maximum pay, without any request or recommendation so to do, or apparent justification therefor, when such an act would have been a radical change in legislative and executive policy and against the public interest.

Further, the act nowhere says that the best service required by the Postmaster General shall entitle a road to maximum pay. It leaves the pay to be fixed by the Postmaster General, "not to exceed" the maximum named. It left his discretion to continue it or to change it from time to time, "not to exceed" the maximum, to be exercised as in his judgment conditions required.

The continuation by the Postmaster General of this gauge of payment has been as much misconstrued by plaintiff as its purpose has been. It argues (App. Bf. p. 12), "Under such conditions, prevailing in 1867 and prevailing now, a train

operated on Sunday was no more within the service contracted for than one or two extra trains run on week days," etc. And again (App. Bf. p. 17), "Even as to railroads performing service on Sunday, the average could not be changed, because Sunday service never was, nor is not now, within the contract and could be discontinued at any time without a reduction of compensation."

Here, appellant wholly disregards the facts as shown by the Postal Laws and Regulations for many years. Paragraphs 2 and 3 of regulation 1834, Postal Laws and Regulations, 1902, provide as follows:

RAILROAD SERVICE.

2. The compensation for service on each route shall be apportioned as nearly as practicable among the several trains carrying mail, according to the average weight of mail carried by each train.

3. Deductions will be made for failure to perform any trips, or a part thereof, on the basis of the mileage and the average weight of the mail carried by the train.

The same provisions are found in the Postal Laws and Regulations, 1913, as paragraphs 2 and 3, section 1488.

Therefore, while it is true that if a railroad company adopts and maintains a schedule of only six round trips a week the full measure of compensation named by the Postmaster General for the service will be paid, yet it is not true that service in excess of six round trips a week is not "within the service con-

tracted for." On the contrary, every train is given its pro rata value at the time the order fixing pay is made, based upon the average weight per day which it carries, and the deduction of that value is made from the pay in case the train is not run.

The reason for this is evident when the system of mail dispatches is considered. Mails are routed to destination in accordance with existing train schedules, which involve all the lines over which they must be carried, their schedule times of departure from and arrival at terminals and connecting points. A letter mailed at one hour of the day may take a different course of dispatch to the same destination than if mailed at another hour. These dispatches are all based upon published and known train schedules, upon which the public and the postal service rely. Therefore, the frequency of train operation, involving as it does the time of day of arrival and departure from any point, becomes of special importance. The public has a right to rely upon it and the postal service assures the public of the quickest dispatch and delivery. The continued operation of a scheduled train for the carriage of mail to be weighed at the time of the regular weighing is expected by the department, unless such a train be withdrawn and new schedules published. This allows a readjustment of the dispatch and carriage of the mails over the railroad on the basis of the revised schedule. Therefore, every train run is contracted for; deduction is made if a scheduled train fails to run; though deduction is not made if the train is permanently

withdrawn and the service does not fall below six round trips a week.

Even if appellant's premise were true, its conclusion would not follow unless it was mandatory upon the Postmaster General to use 6 as a divisor in all cases. In this exigency the plaintiff assumes that the practice of naming the minimum requirement as above set forth fixed a "contract" or "working" day (App. Bf. p. 16), and that by the act of 1873, "with six round-trip service having been made universal, it naturally and automatically fixed the divisor six." (App. Bf. p. 17.)

It argues that it would have been and is now impossible to apply the act of 1873 to conditions as they actually existed, or as they exist now, so as to get one uniform divisor out of it, without having an assumed daily average for one or the other of the six or seven day routes except upon the grounds assumed by plaintiff, namely, a common contractual service by all roads of six round trips a week. (App. Bf. p. 19.)

But appellant's own statement carries with it conclusions which destroy it. It says (App. Bf. p. 17):

The six-round trip service having been made universal, it naturally and automatically fixed the divisor 6.

Appellant here admits that the Postmaster General could have exercised his discretion at one time. Hence he could have made some other determination with equal authority. The report for 1867 shows the frequency of railroad mail service from 3 to 61 trips

a week. Many are 6, 12, 7, 14, 8, etc. (Report of Postmaster General, 1867, pp. 72-85.) The Postmaster General could have made 12 or 14 round-trip service universal, and by plaintiff's logic such action would have fixed "the divisor" at 12 or 14, as the case might be. This would lead to an absurd result.

It is obvious that the fundamental assumption of plaintiff as to the meaning of the provisions of the act of 1873 is untenable. There was indeed an express contract—one that has been fully performed. But it involved no use of a divisor fixed by law or selected in any manner other than by the exercise of the discretion conferred upon the Postmaster General. In fact, as we have shown elsewhere, the divisor *per se* such does not enter into the contract, as made, at all.

II.

Appellant suggests an implied contract growing out of the fact that a part of its lines were aided by land grants, but misconceives the measure of the value of the service if such contract existed.

Appellant urges that if it be held that there was no express contract it is entitled to recover under an implied contract, and the terms upon which recovery shall be had grow out of its obligations as a land-grant road. It will be observed, however, that this contention necessarily eliminates all consideration of the terms of pay for the service performed over all appellant's routes which are not land-grant mileage. This seems to involve a necessary concession of the Government's contention that as to those routes the terms named by the

Postmaster General in his readjusting orders must govern the rights of the parties, and the matter may be left with what is said in our brief in the *New York Central* case.

As to the land-grant routes, it may first be noted that the supposed obligation of the aided carrier to transport the mails over such routes was one wholly for the benefit of the United States. And the Postmaster General, in dealing with the appellant, did not purport to rely upon the legislation quoted, but negotiated with them as with the other claimants upon a basis of mutual freedom to contract. He may have done so because it was impracticable to depart from a uniform method of departmental administration and to set up particular machinery for handling these sporadic land-aided routes. He may have done so because the statute, while purporting to impose an obligation, omitted any effective penalty for disobedience, and failed to point the way to its practical enforcement. Or he may have done so for other reasons. His motives are immaterial. If, as we say, and as appellant itself contends, the service was rendered under express contract, the terms of that contract govern the relations between the parties. *Chicago and Northwestern Railroad Company v. The United States*, 15 Ct. Cls. 232, 245; 104 U. S. 680; *Chicago, Minneapolis and St. Paul Railroad Company v. The United States*, 104 U. S. 687.

In dealing with this subject, however, appellant seems to depart from its own theory of express contract. It appears to contend that it had no

option with respect to the performance of service; that therefore performance raised no legal presumption against it; that it is consequently entitled to recover a reasonable value of the service performed; and that such reasonable compensation is necessarily measured by the compensation allowed by the Postmaster General under the statutes prior to the operation of the divisor order No. 412.

Taking the case in the most favorable light for appellant and conceding *arguendo* that there was no express contract with respect to these land-grant routes, that appellant was under perpetual contract to carry the mails, and that there were no other factors affecting the case, the appellant became entitled by its performance of service to reasonable and just compensation.

What the Postmaster General did meets this requirement. The compensation allowed appellant was at the maximum rates provided by law. These rates were applied to average daily weights ascertained by the application of Postmaster General's order No. 412. This ascertainment was a proper exercise of the discretionary powers reposed in the Postmaster General, as fully set forth in the brief in the case of New York Central and Hudson River Railroad Company, No. 133.

In order for appellant to prevail in this contention it must show that the compensation which was allowed by the Postmaster General was not reasonable and just. No evidence whatever was submitted, no facts are found which tend to establish the

contention that the rates allowed were unreasonable or unjust, or to establish any other rate of pay as reasonable and just.

To meet this difficulty, however, appellant argues that "the language of the law fixes what reasonable compensation is" (App. Bf. p. 77), and then endeavors to establish the fact that under the decisions of the courts the maximum rate fixed by the act of 1873 and amending acts is reasonable compensation. This argument, of course, leads back to appellant's contention that those statutes fixed rates over which the Postmaster General has no control, which has elsewhere been shown to be unsound. It involves, of course, the further assumption that both the rate and the method of establishing its basis of application were thus fixed. The quotations in appellant's brief from the *Eastern Railroad case* and *Jacksonville, Pensacola and Mobile case*, mean nothing for appellant's contention here more than that in the absence of other evidence the rates fixed by the statutes could be regarded as reasonable. There would be no dispute upon this point.

The case of *Jacksonville, Pensacola and Mobile Railroad Company v. The United States* (21 Ct. Cls. 155), cited by appellant, is in fact unfavorable to its contentions. That claimant was a land-grant railroad company, which during the period preceding July 1, 1875, was carrying mails under an express written contract. Thereafter, from July 1, 1875, to June 30, 1876, it performed service under orders of the Postmaster General, and the claimant contended that

under these conditions it carried under an implied contract at the preexisting rates. The Court of Claims refused to take this view of the matter and decided adversely to the claimant, saying:

When, therefore, on and after July 1, 1876, the company carried the mails without any special contract with the Postmaster General, it was bound by the contract of that act, making its compensation subject to the laws of Congress. The company had no option in the matter. It was obliged to carry the mails, and to accept whatever price Congress might determine, and that price might be established after, as well as before, service performed. (P. 170.)

The laws of Congress fixing the rates for land-grant roads included the laws fixing the rates for service generally; that is to say, when Congress took affirmative action fixing the rates for service on land-grant roads such action was merely a reduction of 20 per cent below the rates otherwise provided for service. The basis of rates allowable therefore were maximum and subject to all the discretion which the Postmaster General could exercise and did exercise with reference to the service generally.

The case was appealed to this court and the opinion below was affirmed. (118 U. S. 626.) Mr. Justice Field, for the court, said:

* * * But where no such collateral stipulations are made, and no duration of time is prescribed, but the service is exacted simply from the obligation growing out of the ac-

ceptance of the condition of the land-grant, it rests in the discretion of the Postmaster General to change the price, from time to time, as in his judgment the public interests may require. It is not to be presumed that in such matters he will act in an arbitrary or unreasonable manner. For any abuse of his authority there is the security, which exists with reference to the action of all heads of the executive departments, in their responsibility to their superior, and liability to be called to account by Congress. No abuse of authority, however, is suggested in the present case. An error of construction as to the rights of the petitioner is alone alleged. (628.)

And again, speaking with reference to the transition from the terms of an express written contract to the terms expressed merely by the Postmaster General's order, involving the Postal Laws and regulations, Mr. Justice Field said as follows:

* * * The Postmaster General may have deemed it expedient for the public interest to change, enlarge, or omit entirely the requirements previously prescribed, and to call for others of a different character. No implication can arise, one way or the other from his inaction. All that the company could ask or expect under the law was that he should prescribe a reasonable compensation for its service, and that the service would be continued so long as the public interests should require. No implication of law could extend further than this.

Additional light is thrown on the matter by a survey of the statutes upon which the appellants

base their argument. The facts, in this connection, are that the appellant, a corporation of the State of Wisconsin, is the successor of the Northern Pacific Railroad Company, which was chartered by Congress (Act of July 2, 1864) and received grants of land. These grants were accompanied by a proviso (*Oregon & California R. R. v. United States*, 238 U. S. 393) that the railroad thus aided should be subject to the use of the United States for postal and other purposes subject to such regulations as Congress might impose respecting charges for Government transportation. By reason of its ownership of certain other parts of its system, appellant has become subject as to those parts to the requirements of certain granting acts whose tenor, so far as material, is summed up in the general statute of 1872 (Act of June 8, 1872, 17 Stat. 309). That statute is as follows:

That all railway companies to which the United States have furnished aid by grants of lands, right of way, or otherwise, shall carry mails at such prices as Congress may by law provide, and until such price is fixed by law the Postmaster General may fix the rate of compensation.

These circumstances do not affect the pending question.

Even in that field, however, it does not help appellants.

For, it having been established that Congress had never provided by law what price shall be paid for the carriage of mails, over these railroads or any

others, except as elsewhere noted by prescribing maxima, the price fixed by the Postmaster General must control as to these. That price has been paid.

From that result appellant can have but one path of escape. It leads, however, to the same conclusion.

For either the Postmaster General's determination of a proper price has the binding force of law or else the situation of these routes is to be determined, as is that of all the nonland-grant aided routes of this appellant and of other claimants, in the light of the facts and by the application of ordinary principles of the law of contracts to the acts of the parties, each being wholly free to contract or to refuse to contract as they saw fit. As has been shown, under those tests there can be no recovery.

CONCLUSION.

On all the theories advanced by appellant it fails to establish a right to other and additional compensation than that which has been allowed by the Postmaster General and which it has fully received in payment for service performed. The judgment of the court below should therefore be affirmed.

ALEX. C. KING,
Solicitor General.

LARUE BROWN,
JOSEPH STEWART,

Special Assistants to the Attorney General.

DECEMBER, 1919.

SUPREME COURT OF THE UNITED STATES.

No. 109.—OCTOBER TERM, 1919.

NORTHERN PACIFIC RAILWAY COMPANY,
APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF AS AMICI CURIÆ ON BEHALF OF THE
EL PASO & SOUTHWESTERN R. R. CO., THE
MORENCI SOUTHERN RY. CO., THE LOU-
ISIANA & NORTH WEST R. R. CO. AND THE
LAKE TAHOE RAILROAD & TRANSPORTA-
TION CO.

WILLIAM R. HARR,
CHARLES H. BATES,

Attorneys.

SUPREME COURT OF THE UNITED STATES.

No. 109.—OCTOBER TERM, 1919.

Northern Pacific Railway Company,	}	Appeal from the Court of Claims.
Appellant,		
<i>vs.</i>		
The United States.		

BRIEF AS AMICI CURIÆ ON BEHALF OF THE
EL PASO & SOUTHWESTERN R. R. CO. ET AL.

The El Paso and Southwestern Railroad Company, the Morenci Southern Railway Company, the Louisiana and North West Railroad Company and the Lake Tahoe Railway and Transportation Company, are claimants in cases now pending in the Court of Claims, which cases (by order of the Court of Claims) are held there awaiting the determination by this Court of this and other cases now before it involving the validity of the orders of the Postmaster General (Nos. 165 and 412, issued March 2, 1907, and June 7, 1907, respectively) changing the method, theretofore in vogue for many years, of ascertaining the daily average weight of mails on railroad routes, which change resulted in considerable loss of revenue to the railroads. Said companies have therefore a special interest in the determination of this case.

In this brief we shall not attempt to review the facts and authorities at length, but simply to state, as concisely as possible, the fundamental considerations which we think govern the determination of the question presented.

I.

THE SOLE AND ONLY QUESTION INVOLVED IS THE VALIDITY OF ORDERS NOS. 165 AND 412 OF THE POSTMASTER GENERAL.

The Distance Circulars signed by the appellant company, covering the mail routes operated by it, contained the following provision:

“The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad mail service.”

In signing these circulars or agreements the Northern Pacific Company notified the Post Office Department that it took exception to said Orders No. 165 and 412 of the Postmaster General, whereupon they were advised by the Department that it would not—

“enter into contracts with any company by which it may be excepted from the operation or effect of any postal law or regulation; and it must be understood that, in the performance of service, from the beginning of the contract term above named, and during the continuance of such performance of service, your company will be subject, as in the past, to all the postal laws and regulations which are now or may hereafter become applicable during the term of this service”. (See Findings of Facts XI, Record, p. 48.)

Manifestly, the only fair reading of the above stipulation in the Distance Circulars is that the company would accept and perform the service contracted for *upon the conditions prescribed by law* and the *lawfully authorized* regulations of the Post Office Department applicable thereto; and the communications between the appellant and the Department with respect to Orders Nos. 165 and 412 of the Department merely serve the purpose of showing that there was a question between the appellant company and the Department as to the validity of those orders. To hold otherwise would be to say that the appellant agreed to perform the service contracted for *without regard to "the conditions prescribed by law"* and subject to *any* order or regulation of the Post Office Department, *no matter how arbitrary and unreasonable* the same might be, and even though such order or regulation *were not only unauthorized by law, but in conflict with the manifest will and intent of Congress itself*, which as we shall now proceed to show is precisely the case with respect to said Department Orders Nos. 165 and 412.

It is sometimes said that the railroads are not obliged to contract with the Postmaster General for the carriage of the mails, but this is not altogether true of what are known as the land-grant roads, such as the Northern Pacific Railway Company, and even as to the non-land-grant railroads it is to be remembered that the public interest is so involved in the prompt and continuous carriage of the mails by these great railroad systems that the managers and directors thereof are necessarily very reluctant to refuse to contract with the Postmaster General, and whenever possible prefer to rely upon Congress and the courts for

their protection, especially where, as here, some of the conditions and restrictions sought to be imposed upon them by the Postmaster General appear to them to be wholly arbitrary and unwarranted.

In the light of these considerations it would seem that fairness and justice require the courts, in an issue of this kind, to be extremely careful to see that the limitations and conditions which Congress has provided with respect to the compensation of the railroads for their services in performing the important public service of carrying the mails are duly observed by the Postmaster General.

It is further to be observed that, in practice, the Post Office Department has allowed and paid the railroads on routes of the character involved in this case, under their contracts, the *full rates* fixed and allowed by the Act of 1873 and subsequent statutes; *and the record indicates that, in fixing the compensation of the appellant company for the services involved in this case the Postmaster General did not undertake to allow said company anything less than the FULL RATES fixed by the statute less the authorized deductions on account of land-grant.* The sole ground for the reduced compensation allowed by the Postmaster General to the appellant company, as the findings of fact plainly show, was the fact that he was of opinion that the proper method of ascertaining the average daily weight of mail prescribed by Congress for the purpose of determining such compensation was that promulgated in his said Orders Nos. 165 and 412, and not that which had always theretofore been followed.

The supposed exceptions to the rule that the full rates fixed and allowed by the statute are always paid, referred to in the brief (p. 66) filed by the Solicitor

General in the Chicago & Alton case (No. 30, Oct. Term, 1916), are in reality not exceptions at all. "Agreement routes" are those established within a contract period, where no weighing has been had to fix the average daily weight. It is a *casus omissus* in the statute which necessarily has to be supplied by the Postmaster General. When the new contract term commences, the Department immediately begins to pay the full rate. In the case of "lap service," the full rate authorized by the statute is apportioned between the roads involved. "Blue tag" matter is not mail, but freight, shipped on fast freight trains and properly paid for as freight. Contracts for weights intermediate those named in the statute, made, as the Solicitor General states, on a *pro rata* basis, are manifestly in accord with the rule. And, as above stated, even assuming that the Postmaster General has authority, under the statute, to contract for the carriage of the mails at less than the full rates prescribed by the statutes of Congress, the point is that, on routes of the character here in question, and in the contracts here involved, he has not undertaken to contract for less than the *pay per mile* authorized by the statute for the respective average weights involved, *properly* ascertained.

II.

ORDERS NOS. 165 AND 412 OF THE POSTMASTER GENERAL ARE IN CONFLICT WITH THE CONDITIONS PRESCRIBED BY CONGRESS FOR ASCERTAINING THE AVERAGE DAILY WEIGHTS OF MAIL.

It will be observed that by the Act of March 3, 1873 (17 Stat. 538) the Postmaster General is authorized and directed to readjust the compensation thereafter to be paid for the transportation of the mails on railroad routes—

“upon the conditions and at the rates hereinafter mentioned, to wit:”

Then following certain specific conditions, among which is the proviso that—

“the average weight to be ascertained in every case by the actual weighing of the mails for such number of successive working days, not less than thirty,” etc.

Manifestly, in adjusting a railroad's compensation, under this statute, the Postmaster General has no authority, by regulation, to disregard the express mandate of Congress as to how the average daily weight of mail carried should be ascertained, *and any order or regulation issued by him attempting so to do is simply void and of no effect.*

We are not concerned, in this case, with the question as to the right of the Postmaster General, under the Act of March 3, 1873, as affected by subsequent

legislation, to allow less than the maximum rates fixed by that Act for the transportation of the mail. Assuming that he has such power, the point here is that he had not attempted to exercise it but simply, by said Orders Nos. 165 and 412, *to change the method prescribed by Congress for ascertaining the average daily weight of mail transported.*

It is true that the Act of March 3, 1873, is not as clear as it might be as to how the average daily weight of the mails is to be ascertained. But any ambiguity or uncertainty in that respect had been fully cleared up at the time the appellant signed the aforesaid contracts, by the contemporaneous and long-continued practical construction of the statute by the Department of the Government charged with its administration, which practical construction, as the record shows, *has been repeatedly ratified and sustained by Congress* despite frequent efforts by the Post Office Department, in recent years, to have it changed. In other words, Orders Nos. 165 and 412 were issued by the Postmaster General long after the exact method of obtaining the daily weight, under the rule prescribed by Congress in the Act of 1873, had been thoroughly settled and established.

The Findings of Fact made by the Court of Claims in this case show, in brief, that the Postmaster-General, in 1907, by said Orders Nos. 165 and 412, undertook to do what Congress had repeatedly refused to do or sanction (Findings of Fact VI, VIII and IX, Record, pp. 34-39); what the Acting Attorney General, in 1884, *in affirming the correctness of said established method of obtaining the daily average weight of mail*, has said *"would defeat the intention of the law and cause no little embarrassment"* (Finding of Fact VI, Record p.

35) ; what Congress, in 1905, had deliberately refused to do when it increased the weighing period from thirty to ninety "successive working days" (Finding of Facts VIII, Record, pp. 36-37) ; and what Congress, in 1907, just prior to the issuance of said orders, had again deliberately refused to do (Findings of Fact IX, Record, pp. 37-39).

If the change in the method of ascertaining the average daily weight of the mail sought to be inaugurated by the Postmaster General in 1907 by said Orders, despite the deliberate refusal of Congress to authorize the same, were in the interest of justice and fair dealing, or for the purpose of carrying out some declared purpose or policy of Congress, there might be some justification for upholding it, but when it appears, as shown by the Findings of Fact herein, that such a change will work a manifest injustice upon the railroads carrying the mails seven days in the week, by enormously decreasing their compensation, and also that Congress has repeatedly and deliberately refused to authorize or sanction such a change, no good reason can be perceived for sustaining said orders.

If ever there was a case of wilful and arbitrary action on the part of an Executive Department of the Government, we have it in these orders of the Postmaster General undertaking to do what Congress, *at that very moment*, had deliberately refused to do, to the consequent injury of the railroads. We refer in saying this to the legislative history of the bill making appropriations for the Postoffice Department which became a law on March 2, 1907, which legislative history is set out in Finding of Fact IX (Record, pp. 37-39).

It will be seen from said Finding IX that Congress again deliberately refused, in passing the aforesaid appropriation bill, to change the established method of

ascertaining the daily average weight of mail, as proposed by the Post Office Department, and then and there rejected amendments to that effect, even after one such amendment had been adopted (but without debate or explanation) in the Senate; and thereupon and notwithstanding, as stated in Finding X, the Postmaster General proceeded, upon his own motion and responsibility, to promulgate Orders Nos. 165 and 412 for the purpose of accomplishing that which Congress had just refused to do. (Record, pp. 39-40.)

It is further to be observed that, as appears in said Finding of Fact IX, Congress, in said Post Office Appropriation Act approved March 2, 1907, authorized and directed the Postmaster General to make certain limited reductions only in the compensation to be paid the railroads for routes carrying an average weight per day of five thousand pounds and over; and that said Act made no change and authorized none to be made in respect to the compensation to be paid on other routes. Yet *on the very day this Act was approved* the Postmaster General, by said order No. 165, proceeded to reduce the compensation of the railroads on *all* mail routes by changing the established method of determining the average daily weight, thus *further decreasing* the compensation to be paid the railroads on those routes as to which Congress, in said Act of March 2, 1907, had just authorized only a certain and specific reduction! (Record, pp. 38-39.)

It is also to be observed, that, as set out in Finding of Fact XIII, the attention of Congress was again called to this matter of ascertaining the average daily weight of mail when the bill making appropriations for the Post Office Department for the fiscal year ending June 30, 1909, was before it, *and that Congress at that time again refused to sanction or approve the*

change in such method proposed by the Postmaster General in said Orders Nos. 165 and 412. (Record, pp. 48-49.)

Can there be any doubt, after all this, as to the wishes of the legislative branch of the Government in this matter?

III.

THE METHOD OF ASCERTAINING THE DAILY AVERAGE WEIGHT OF MAIL FOLLOWED BY THE POST OFFICE DEPARTMENT FROM 1873 TO 1907, AND RATIFIED AND APPROVED BY CONGRESS AS AFORESAID, IS ESSENTIALLY JUST AND EQUITABLE.

Upon this point it would seem sufficient to quote Finding of Fact VII of the Court of Claims, which reads (Record, p. 36):

What is called a documentary history of the Railway Mail Service from its origin in 1834 to the present time; prepared by the general superintendent of the Railway Mail Service, *was transmitted to the Senate with a letter by the Postmaster General on January 21, 1885, in compliance with a resolution of the Senate*, and, among others, said document contains the following statements:

"Some little controversy at one time existed as to the justice of the present methods of obtaining the average daily weight to be taken as a basis for determining the annual pay, *but a little examination made it clear that no other way of proceeding could be so just as that now in vogue.*"

"The present rule is on those roads carrying the mails six times a week to weigh the mails on

30 consecutive days on which the mails are carried, which would cover a period of 35 days; dividing the aggregate 30 weighings by 30 will give the daily average. On those roads carrying the mails seven times per week the weighing is done for 35 consecutive days (including Sundays) and the aggregate divided by 30 for a basis of pay.

"It is evident that the period during which the weighing is continued covers, in both cases, all the mails carried for 35 days. If, in the second case, we should take our basis from an average obtained by dividing the aggregate weight by 35 we should commit the absurdity of putting a premium upon inefficiency, for evidently if the Sunday train were cut off we should virtually have the same mails less frequently carried, and therefore, with a higher daily average, and, therefore, a higher pay basis than in the case where the seventh train was run and the greater accommodation rendered.

"The present method gives no additional pay for the additional seventh train, but the other method would cause a reduction on account of better service, and practically would operate as a fine on all those roads carrying the mails daily and including Sundays."

Said document was printed as Senate Executive Document 40, Forty-eighth Congress, second session.

The argument against this long-established and practical method of ascertaining the average daily weight is purely technical, theoretical and academic only, substituting form for substance.

From the passage of the Act of March 3, 1873, down to the promulgation of said Orders Nos. 165 and 412 in 1907, the Post Office Department treated this question from the sensible and practical standpoint, and

Congress, after being repeatedly advised thereof, refused again and again to sanction any change in the method adopted.

It is to be observed that, under their contracts with the Post Office Department, the railroads have never been *required* to carry the mails more than *six round trips (occupying six days)* a week, and that by discontinuing their Sunday service on the seven day routes, and thus inconveniencing the public, they might have accomplished, under the terms of their contracts, exactly the same result, so far as the average daily weight of mail is concerned, as was accomplished by the practical method adopted by the Department, under the Act of 1873, of ascertaining that average.

For the Courts now to uphold the Post Office Department in its attempt to reduce the compensation of the railroads by changing the prescribed and established method of ascertaining the daily average weight of mail, after the repeated refusal of Congress to authorize or sanction such change, would be to sustain a gross abuse of executive power and to infringe upon the legislative domain, as well as to impair the validity of existing contracts. This latter point we will elaborate below.

It is to be noted that the daily average weight of mail so ascertained is used as a basis for fixing the compensation of the railroads for carrying the mail for a four-year period, during which the probabilities have always been that the weight of mail would be considerably increased. A method, therefore, which at least did not discriminate against roads that were carrying the mail seven days in the week, although required, by their contracts, to carry them only six days, was eminently more fair and just than one which would discriminate against such seven-day routes. It

will be observed further that under no circumstances, not even by changing the divisor so as to include all the days in the weighing period, instead of the number of working or week days, would the railroads be paid for the weight of mail actually carried, and that the method originally adopted and followed, for so many years, with the knowledge and approval of Congress, was more apt to approximate the actual weight of mail carried than that attempted to be substituted by the Postmaster General in 1907 by the orders in question.

IV.

SAID ORDERS NOS. 165 AND 412 OF THE POSTMASTER GENERAL CONSTITUTE A VIOLATION OF THE TERMS OF APPELLANT'S CONTRACTS.

It will be noted that appellant agreed, as stipulated in the above quoted provision of the Distance Circulars—

“to accept and perform mail service upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail service.”

As above pointed out, one of “the conditions prescribed by law, was the provision in the Act of 1873, as amended in 1905, that in fixing the railroad’s compensation the average daily weight of mail should be determined by the Postmaster General in a certain way, which way, including the divisor to be used, had been definitely established at the time appellant entered into said contract, to wit, in July, 1907, and too, by the action of the Post Office Department itself,

acquiesced in by the railroads. Clearly, therefore, appellant, when it signed said contracts, had the right to rely upon said established method of ascertaining the daily average weight of mail as one of the conditions prescribed by law for fixing its compensation, and to disregard, as it had notified the Postmaster General it would, his unauthorized and unlawful attempts to change that method. Clearly also it was a breach of appellant's contract for the Postmaster General thereafter to insist upon disregarding said established method of determining said average weight of mail and insist on substituting the method prescribed by Orders Nos. 165 and 412.

In short, the contract was made in the light of the fact that the long-established method of determining said average weight was one of "the conditions prescribed by law for the adjustment of appellant's compensation," and the Postmaster General had no authority to depart from that method in determining said average weight for the purpose of fixing appellant's compensation.

The suggestion that the method of ascertaining the daily average weight, prescribed by Congress in the Act of 1873, was merely for the convenience of the Postmaster General in determining the compensation to be allowed on a given route, and therefore he could change that method as his judgment and discretion dictated is also clearly without merit. The very purpose of this said provision in the Act of 1873 was to limit the authority of the Postmaster General in adjusting the railroads compensation, for the better protection, presumably, of both the railroads and the Government.

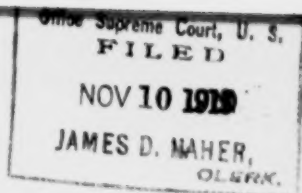
The further suggestion that there is no ambiguity in the Act of 1873 is necessarily predicated upon the hypothesis that the method originally adopted by the Post Office Department to determine the daily average weight of mail, by using as the divisor the number of "working days" in the weighing period instead of the whole number of days covered by the weighing period, was obviously and unquestionably erroneous, notwithstanding that said method was followed by the Department from 1873 down to 1907; notwithstanding Congress has repeatedly and deliberately refused to change or authorize said method to be changed, notwithstanding the Acting Attorney General, in 1884, declared such method to be correct; notwithstanding the Court of Claims, in its original findings of fact and conclusions of law in the Yazoo and Mississippi Valley Railroad case, found said method to be correct; notwithstanding this court, on the appeal in that case and the case of the Chicago & Alton Railroad Company, was equally divided as to the correctness of the second judgment rendered by the Court of Claims upon said proposition; and notwithstanding the fact that no court or counsel, despite all the various and conflicting decisions and opinions that have been had in this matter, has yet been able to state, in an absolutely clear and convincing manner, just what the provision in the Act of 1873 as to ascertaining said average weight means. Unquestionably, therefore, said statute is ambiguous, and if it be ambiguous, appellant's contentions must be sustained, because, as above pointed out, that ambiguity had been resolved, in the interests of justice and right, by the contemporaneous

and long-continued practical construction of the statute by the Department charged with its administration, which construction has been frequently and deliberately sustained by Congress, and had been so sustained and practically adopted by Congress just prior to the Postmaster General's attempt to change the same by the orders in question.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1919.

No. 109.

NORTHERN PACIFIC RAILWAY COMPANY,
APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

ON APPEAL FROM THE COURT OF CLAIMS.

BRIEF, AMICI CURIAE ON BEHALF OF CHICAGO,
BURLINGTON & QUINCY RAILROAD
COMPANY.

ABRAM R. SERVEN,
BURT E. BARLOW,
Amici Curiae.

THOMPSON & SLATER,
Of Counsel.



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**BRIEF, AMICI CURIÆ ON BEHALF OF CHICAGO,
BURLINGTON & QUINCY RAILROAD
COMPANY.**

This brief is filed, by leave of the court, by counsel whose names are signed to it, on behalf of the Chicago, Burlington, and Quincy Railroad Company.

The findings of fact returned to this court by the Court of Claims in the case of the Northern Pacific Railway Company *vs.* The United States is made the basis of this brief, and all references herein made to the record refer thereto.

The assignment of errors appearing in appellant's brief is adopted.

The interpretation of the controlling statute in this case has been twice argued before this court, and at the conclusion thereof the decision of the lower court was affirmed by an equal division of opinion of the members of this court.

After the year 1860 the Congress of the United States, desiring to aid in the construction of railroads through the undeveloped portion of its territory lying in the West and South, at different times, by congressional enactment, granted to railroads, upon the construction of certain mileage, portions of the public land, and as a condition of such grants provided:

"That the United States mail shall be transported over said road, under the direction of the Post Office Department, at such price as Congress may by law direct: *Provided*, That until such price is fixed by law the Postmaster General shall have the power to determine the same" (Rec., p. 29).

Congress also provided for the incorporation of railroad companies for the purpose of constructing railroads in such territories, and as a condition of incorporation and further privileges granted by Congress, made certain restrictions on such railroads, under which they were made post routes and subject to such regulations as Congress might impose, restricting charges against the Government for services. The appellant, the Northern Pacific Railway Company, as to part of its railroad right of way, is subject to those acts of Congress granting lands to railroad companies and as to part of its right of way is subject to the act by which the Northern Pacific Railroad was chartered by Congress, under all of which statutes it was required to transport mail over its railroad when tendered to it by the United States (Rec., p. 29).

In 1873 Congress passed an act relative to the transportation of mails by railroad companies, the material part of which is as follows:

*"Provided, That the Postmaster General be, and he is hereby, authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned, to wit, that the mails shall be conveyed with due frequency and speed: that sufficient and suitable room, fixtures, and furniture, in a car or apartment properly lighted and warmed, shall be provided for route agents to accompany and distribute the mails; and that the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars; * * * the average weight to be ascertained in every case by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times, * * * and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct" (Rec., p. 50).*

Prior to 1875 the mails were weighed by the railroad companies. After 1875 the mails were weighed by the Post Office Department (Rec., p. 51). The Postmaster General, by order, divided the territory of the United States into four sections and those sections into railway mail routes. Over certain of these railway mail routes trains ran 7 days per week and over other mail routes trains ran 6 days each week. From 1873 to 1905 the method used in obtaining the average weight of the mails was to weigh such mails for the minimum statutory period of 30 consecutive working days, and in making such weighings Sunday was not counted as a working day (Rec., p. 33). On those routes upon which Sunday trains were operated the mails were weighed on Sunday and the weight so ascertained was added to the weighing made on Monday. The mails carried on Sunday were considered as Monday mail. As a result of this method the period over which the weighing took place covered 35 days,

as 5 Sundays would intervene between the first and the thirtieth of 30 consecutive working days. The weights so obtained were added together and the result divided by 30 to secure the average weight of mails carried per working day (Rec., p. 33).

At different times between 1873 and 1907 the act of 1873 was re-enacted, changed, and modified, but at no time was the method by which the average weight of mails was to be determined changed. In 1874 Congress re-enacted the act of 1873. In 1875 Congress provided that the weighing of the mails should be done by the employees of the Post Office Department and not by the railroads (Rec., p. 51). In 1876 Congress reduced the maximum compensation which could be paid to railroads for mail transportation 10 per cent from that theretofore provided (Rec., p. 51). In 1878 the maximum compensation payable to railroads for mail transportation was further reduced 5 per cent by Congress (Rec., p. 52). In 1905 Congress re-enacted the method by which the average weight should be found, and changed the number of working days which should be included within the weighing period from not less than 30 to not less than 90, the exact wording of the provision being as follows:

"Provided, That hereafter before making the readjustment of pay for transportation of mails on railroad routes, the average weight shall be ascertained by the actual weighing of the mails for such a number of successive working days not less than ninety, at such times after June thirtieth, nineteen hundred and five, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct" (Rec., p. 52).

In 1906 Congress empowered the Postmaster General to collect fines from railroad companies for delay in transporting the mail (Rec., p. 53). In 1907 Congress reduced the maximum sum which should be paid for railway mail trans-

portation on routes carrying more than an average weight of 5,000 pounds per day 5 per cent (Rec., p. 53).

February 12, 1907, the Postmaster General caused to be sent appellant a distance circular, which was used for the purpose of determining the mileage and average daily weight of mails on the routes specified in the circular. At the bottom of the circular the following clause appears:

"The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail service" (Rec., p. 40).

March 2, 1907, the Postmaster General issued order No. 165 and June 7, 1907, order No. 412, as follows:

Order No. 165. "That when the weight of mail is taken on railroad routes the whole number of days the mails are weighed shall be used as a divisor for obtaining the average weight per day."

Order No. 412. "Ordered, that Order 165, dated March 2, 1907, be, and the same is hereby, amended to read as follows:

"That when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day" (Rec., p. 39).

Thereafter the Postmaster General submitted order No. 412 to the then Attorney General, who rendered an opinion sustaining the legality thereof. The distance circular sent to appellant was signed and returned to the Postmaster General, and as a part thereof appellant excepted to Order No. 165 and order No. 412, and accompanying the signed distance circular was a formal protest against the said orders on the ground of their illegality (Rec., p. 43).

The Post Office Department did not consent to the change in its distance circular and notified appellant that:

"And during the continuance of such performance of service, your company will be subject, as in the past, to all the postal laws and regulations which are now or may become applicable during the term of this service" (Rec., p. 44).

The Postmaster General, upon the return of the distance circular, caused the amounts to be paid to appellant for the carriage of the mails over the routes in question to be figured, and in so figuring the payment to be made therefor divided the sum of the weighings which were made for 90 days by 105, and the sum of the weighings which were made for 105 days by 105 (Rec., pp. 39 and 46). Notice was given of this adjustment of compensation for mail transportation to appellant, the last clause of such notice reading as follows:

"This adjustment is subject to future orders and to fines and deductions and is based on a service of not less than 6 round trips per week" (Rec., pp. 42 and 43).

After the promulgation of order No. 412 appellant carried the mails on the various routes specified in the record as seven-day routes for 7 days in each week and as six-day routes for 6 days in the week and was paid therefor, upon the basis of the average daily weight of mails carried, and this average daily weight of mails carried was found by weighing the mails for 105 days, including Sundays, and adding such weighings together and dividing the sum thereof by 105. The facts touching the correspondence between appellant and the Post Office Department as to each route were identical, it being claimed as to each route by appellant that Sundays should not be included in the weighing period, and that the sum of the weighings for 105 days should be divided by the 90 working days or secular days composing such period.

The difference between the amount paid to appellant under the Post Office Department's method of determining the

average daily weight of the mail and the sum which would have been paid to appellant by using the method provided by statute for determining the average daily weight of the mail is \$704,871.63, and this is the amount in issue.

The question presented to this court for determination is whether in determining the pay per mile per annum for the transportation of the mails the average weight of mail per day shall be found by adding the weights carried for 90 successive working days, exclusive of Sundays, the Sunday mail, if any, being added to the Monday weight and the result divided by 90, or whether Sunday shall be treated as a working day and included in the number of days making up the weighing period, thus causing the sum of the daily weights where the weighing period covers 90 secular days and the mail is carried on Sunday to be divided by 105 instead of by 90, inasmuch as 15 Sundays intervene in 90 secular days.

I.

What is the proper construction of that part of the act of 1873, as re-enacted and amended, which directs the method of ascertaining the average daily weight of the mails? (The mandatory character of the act is fully analyzed in the discussion of the lower court's opinion, sub-division 4, Part VI, page 48 herein.)

The material part of the act of 1873 amended and re-enacted, presented for consideration in this case, is as follows:

Provided, That the Postmaster General be, and he is hereby, authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned, to wit, that the mails shall be conveyed with due frequency and speed; that sufficient and suitable room, fixtures, and furniture, in a car or apartment properly lighted and

warmed, shall be provided for route agents to accompany and distribute the mails; and that the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars; * * * the average weight to be ascertained by the actual weighing of the mails for such a number of successive working days, not less than ninety, at such times, * * * and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct.

The question now presented is what is the proper construction of the above statute, regardless of any construction placed upon it heretofore by either the Department of Justice or the Post Office Department, for in the final analysis it is the act of Congress which will govern. The first sentence of the statute is that which authorizes and directs the Postmaster General to readjust compensation paid for the transportation of mail. The authority given to him is not unlimited, but is expressly limited to the *conditions and rates mentioned* in the act.

The courts do not read into the acts of Congress exceptions that are not therein contained, and they do not read out of acts of Congress conditions and limitations that are contained therein. This court will not construe the act of Congress as ending before the enumeration of the conditions and rates mentioned in the act. If Congress had desired to place no conditions or limitations upon the compensation to be paid for the transportation of the mails the act would have read as follows:

“That the Postmaster General be and is hereby, authorized and directed to readjust the compensation hereinafter to be paid for the transportation of mails on railroad routes.”

The language of the act is specific and clear as to the conditions and rates upon which compensation for the transportation of mails is to be readjusted, and those conditions and rates are the only ones which were legally binding upon the United States. This case does not deal with the discussion of the conditions of railway mail transportation, and therefore that part of the statute specifying such conditions is not analyzed. The case does involve the rates for railway mail transportation, and that part of the statute which prescribes the rates to be paid is that which is presented to the court for construction. The statute limits the maximum sums to be paid for the transportation of the mails, after the average weight of mails carried the whole length of their route per day has been determined. The statute provides that not more than certain fixed sums shall be paid for the carriage of the mails where the weight of the mails so carried equals an average weight per mile per day of certain amounts. No question is raised in this case as to the maximum rate fixed in the statute for the carriage of the mails, and this question is not in issue.

The method of obtaining the average weight per day is explicitly set forth in the statute in the following words:

"The average weight to be ascertained by the actual weighing of the mails for such a number of successive working days not less than ninety, at such times, * * * and not less frequently than once in every four years."

The wording of the statute clearly directs the manner in which the average weight per day of the mails shall be ascertained.

"Where a statute directs the performance of certain things in a particular manner, it forbids by implication every other manner of performance."

State vs. Crawford (N. D.), 162 N. W., 710-717.

State vs. High (Ariz.), 130 Pac., 611.

The method, then, of obtaining the average weight of mails prescribed by the statute must be followed in obtaining such average, and every other method of obtaining an average weight is excluded.

Neither the times of weighing nor the number of days making a weighing period are in dispute. It is only the kind of days that are to be included in the weighing period that is in dispute.

"It is a rule alike applicable to statutory and constitutional law that when the law directs something to be done in a given manner, or at a particular time or place, then there is an implied prohibition against any other mode or time or place for doing the act."

State vs. Stark Co., 14 (N. D.), 368; 103 N. W., 914.

This is but another way of stating that a manner of doing an act specified by statute must be literally complied with. Where the language of the act is explicit, then no departure from the words used in the act can be permitted.

"But it is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provision."

Denn vs. Reid et al., 35 U. S., 524-527.

The statute provides that the weighing period shall consist of "working days," and it is these words in the statute over which the present dispute has arisen. That the words "working days" did not at that time mean to Congress the same thing as the word "day" is clearly shown by the fact that the word "day" is used without qualification in the earlier part of the statute as follows:

"On routes carrying their whole length an average weight of mails per day of 200 pounds * * *."

Whereas when Congress came to prescribe the method of obtaining the average weight per day it limited the days which should be contained in the weighing period to "working days." If there had been no intention to differentiate between the word "days" and the words "working days" the word "days" would have been used in the latter part of the section. The fact that the word is used without qualification in one place in the statute and with qualification in another place in the statute absolutely precludes a construction of the act which, in effect, does away with the word "working" used in conjunction with the word "day."

"Every statute must be construed from the words in it, and that construction is to be preferred which gives to all of them an operative meaning."

Early vs. Doe, 16 How., 616.

As the phrase "working days" must be construed in determining what days shall constitute the weighing period, the common and ordinary meaning of the words will be those given to them by this court, in the absence of some custom or usage showing a contrary meaning. No particular custom or usage is claimed on the part of appellees for the term "working days," and there is no finding of fact or evidence in the case showing that the words "working days" have any peculiar or unusual meaning other than the ordinary and accepted meaning attached to the phrase.

"The popular or received import of words furnishes a general rule for the interpretation of public laws as well as of a private and social transaction.

Millard vs. Lawrence, 16 How., 251.

Arthur vs. Morrison, 96 U. S., 108-109.

Greenleaf vs. Goodrich, 101 U. S., 278-285.

Caldwalader vs. Zeh, 151 U. S., 171-176.

Glover vs. United States, 164 U. S., 294-297.

The Congress must be presumed to have intended to use language in its ordinary meaning, unless it would manifestly defeat the object of the provision.

Minor vs. Mechanics Bank, 1 Pet., 46.

The statute should be read according to the natural and obvious import of its language without resorting to subtle and forced construction, for the purpose of either limiting or extending its operation, and when the language is plain, words or phrases should not be inserted so as to incorporate in the statute a new and distinct provision.

United States vs. Temple, 105 U. S., 97.

United States vs. Graham, 110 U. S., 219.

United States vs. Hill, 120 U. S., 169-180.

United States vs. Lynch, 137 U. S., 280-285.

Houghton vs. Payne, 194 U. S., 88-100.

Webster's International Dictionary gives the following meaning to the words "working day": "A day when work may legally be done in distinction from Sundays and legal holidays."

The Century Dictionary gives the following meaning to the words "working day": "Any day on which work is ordinarily performed as distinguished from Sundays and holidays."

A similar construction has been placed upon the phrase "working day" by the Federal courts in their construction of charter parties.

Pederson vs. Eugster, 14 Fed., 422, and similar cases.

This meaning of the phrase as defined by the standard dictionaries and the decisions of the Federal courts in those cases involving charter parties is the commonly accepted construction of the words.

The reason that the words "working days" does not mean Sundays lies much deeper in the life of our country, how-

ever, than mere dictionary definitions or the decisions of the courts upon special definitions of phrases. It is based upon our religious beliefs. This court has never hesitated in its decisions in basing them upon the recognized religious tenets of our people.

In *Church of the Holy Trinity vs. United States*, 143 U. S., 457, this court held:

"If we examine the constitutions of the various States we find in them a constant recognition of religious obligations. Every constitution of every one of the forty-four States contains language which either directly or by clear implication recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well-being of the community. * * * There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons; they are organic utterances; they speak the voice of the entire people. While because of a general recognition of this truth the question has seldom been presented to the courts, yet we find that in *Updegraph vs. Com.*, 11 Serg. & R., 394, 400, it was decided that, "Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania; * * * not Christianity with an established church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men." And in *People vs. Ruggles*, 8 Johns., 290, 294, 295, Chancellor Kent, the great commentator on American law, speaking as Chief Justice of the Supreme Court of New York, said: "The people of this State, in common with the people of this country, profess the general doctrines of Christianity, as the rule of their faith and practice, * * *. If we pass beyond these matters to a view of American life as expressed by its laws, its business, its customs and its society, we find everywhere a clear recognition of the same truth. Among other

matters note the following: * * * These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation."
* * *

Even the Constitution of the United States in the proviso by which the chief executive is given ten days within which he may veto an act of Congress, excepts from such ten days, "Sundays."

The construction of the phrase "working days" ultimately rests upon the Fourth of the Ten Commandments which are the cornerstone of our religious beliefs:

"Remember the Sabbath Day to keep it holy. Six days shalt thou labor and do all thy work; but the seventh is the Sabbath of the Lord thy God; in it thou shalt do no work."

That the days upon which work shall be done are the secular days of the week has been and is as firmly imbedded in the mind of every boy and girl of this country as that the sun will rise and set. The teachings of childhood become the rules governing the conduct of men, and subconsciously the members of Congress square the laws they make by their religious training, and so in this case they naturally excluded Sunday from the days which form the basis for determining the rate of pay under the act, and intended to make working days, which do not and never have meant Sunday, the basis for figuring the rate of pay on the purely commercial contracts of the United States for the transportation of mails. The fixed policy of the Government in this respect is further shown by the fact that Congress has never required the railroads to operate Sunday trains and the Post Office Department, in carrying out the acts of Congress, has never required the operation of Sunday trains by railroads. The very agreement upon which the present case is based

closed with a clause showing that payment for the transportation of the mails over the various routes can be obtained upon the carriage of them during 6 days in each week. The closing clause of the order on which payment is made for the transportation of mails reads as follows (Rec., pp. 42 and 43):

"This adjustment is subject to future order and to fines and deductions and is based on a service of not less than 6 round trips per week."

From the above it would seem clear that "working days" meant week days or secular days and not Sundays. This was the construction placed upon the law by the Post Office Department from 1874 to 1884. This was the construction placed upon the law by the Department of Justice in 1884 and consistently followed by the Post Office Department from 1884 to 1905, and is not only not illegal, irrational, arbitrary or manifestly erroneous, but is the only logical construction that can be placed upon it.

If there should still be any doubt as to what Congress understood was meant by the words "working days" in 1905, when the act of 1873 was re-enacted, a careful reading of the following act, passed in 1900 and in effect in 1905, appellant believes will remove every vestige of doubt:

"That letter carriers may be required to work as nearly as practicable only eight hours on each working day, but not in any event exceeding forty-eight hours during the six working days of each week; and such number of hours on Sunday, not exceeding eight, as may be required by the needs of the service; and if a legal holiday shall occur on any working day, the service performed on said day, if less than eight hours, shall be counted as eight hours without regard to the time actually employed."

Act of June 2, 1900, chapter 613, section 1 (31 Stat. L., 257).

"The words of a statute—if of common use—are to be taken in their natural, plain, obvious, and ordinary signification. The legislative intent is to be sought for through this ordinary signification of common words; and if a contemporaneous construction of the same words by the legislature itself can be discovered, it is very high evidence of the sense in which the words are to be received."

Phila. and Erie R. R. Co. vs. Calawissa R. Co.,
53 Pa. St., 20-60.

"Whatever may have been in the minds of individual members of Congress, the legislative intent is to be sought, first from the words they have used. If these are clear, we need go no further; if they are obscure or ambiguous, then the intent may have to be sought out by reference to the context, to previous or concurrent enactments, to the history of the art or trade, to general history, to anything that will throw light on the meaning of the obscure or ambiguous terms used."

Merritt vs. Welsh, 104 U. S., 694.

It therefore follows that the act of 1873, as amended and re-enacted, specifically directs the mode of ascertaining the average daily weight of the mails and in so specifying the mode directs that the weighing period shall consist of working days, and that the words "working days" do not include Sundays, and, therefore, the lower court erred in including in the weighing period Sundays and its decision should be reversed.

II.

Did Congress, by re-enacting in 1874 the act of 1873, adopt the construction theretofore placed upon the act and so remove any question of ambiguity that might theretofore have existed? Did Congress, by re-enacting in 1905 that portion of the act of 1874 defining the method by which

the average daily weight of the mails should be determined, adopt the construction placed upon the act from 1874 to 1905 and so remove any ambiguity that might theretofore have existed? Did Congress, by re-enacting in 1905 that portion of the act of 1874 providing the method by which the average daily weight of the mails shall be determined, after the act, at the request of the Post Office Department, had in 1884 been construed by the Attorney General, adopt the construction placed upon the act by the Attorney General and remove any ambiguity that might theretofore have existed?

That part of the act of 1873 which provides the method of determining the average daily weight of the mails is as follows:

"The method of determining the average weight to be ascertained in every case by the actual weighing of the mails for such a number of successive working days not less than 30, at such times * * *." (Rec., p. 50.)

No change was made in the wording of this part of the act regulating the compensation to be paid for the transportation of mails when it was re-enacted and made a part of the Revised Statutes in 1874. The wording of this part of the act remained the same until 1905, when this section of the statute was re-enacted as follows:

"Provided, that hereafter before making the readjustment of pay for transportation of mails on railroad routes, the average weight shall be ascertained by the actual weighing of the mails for such a number of successive working days not less than ninety, at such times after June thirtieth, nineteen hundred and five, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct" (Rec., p. 52).

A comparison of the act of 1873 and the act of 1905 shows that no material change is made in the act of 1873 by the act of 1905, except that the minimum number of working days which constituted the weighing period was changed from 30 working days to 90 working days. The act remained in substance the same from 1873 to the date of the institution of this suit, and any construction placed upon the act of 1873 and the re-enactment thereof appearing in the Revised Statutes would equally apply to the subsequent re-enactment thereof in 1905.

"It is a familiar canon of interpretation that all former statutes on the same subject, whether repealed or unrepealed, may be considered in construing the provisions that were retained in force."

Veitervo vs. Friedlander, 120 U. S., 725.

Upon the taking effect of the act in 1873 it was, of course, necessary that the average daily weight of the mails should be ascertained in order that the rate of pay per mile per annum could be determined. It does not appear in the record that any difficulty was encountered at that time in determining the method to be pursued under the statute. Although the mails were weighed for two years by the railroads no question was ever raised, either by the Post Office Department or by the railroads, as to the method to be pursued in obtaining the average daily weight. No Post Office regulation appears by which a construction of the statute was made. We have, therefore, a rather remarkable situation existing during these two years, namely: the weighing of the mails by between 700 and 800 different railroads, each construing the act according to its own notion and each construing the act in exactly the same way.

The construction placed upon the act by the various railroad companies was that the mails should be weighed for 30 successive working days and that "working days" meant secular days and not Sundays, and if mail was carried on

Sundays the weight of such mail was added to the Monday weighing. The sums of the weighings so made were added together and divided by 30 (Rec., pp. 33 and 34). The construction so placed upon the act by the various railroad companies met no objection upon the part of the Post Office Department, and in 1875, when the law of 1873 was amended so as to require that the weighing of the mails be performed by the employees of the Post Office Department, the Post Office Department placed the same construction upon the act in making its weighings thereunder that had been placed upon it by the railroads (Rec., pp. 33 and 34). It should be borne in mind that the constructions placed upon the act by the railroad companies during their period of weighing and the construction placed upon the act by the Post Office Department upon the amendment of the act in 1875, were constructions placed upon the act within a short time after its passage and must be presumed to more clearly reflect the intention of Congress at the time of its passage than a construction placed upon the act at a much later date. From 1876 to 1884, without apparent hesitation or doubt as to what construction should be placed upon the act, the Post Office Department continued to apply the statute, and in doing so construed the words "working days" to mean secular days and not Sundays, and continued to add on those routes which carried mails on Sundays, the weight of Sunday mail to the Monday weighing. During this early period, from 1875 to 1884, it should be borne in mind that each and every year Congress passed an appropriation bill providing sums necessary to pay the yearly sums due for the transportation of the mails. Congress, of course, is presumed to have exercised ordinary care in its consideration of payments of public moneys to be made by the Post Office Department and to have been informed as to the construction placed upon the law under which these payments were made. This would be particularly true during this early period, because the law was at that time continually before Congress for amendment,

and the amendments proposed and passed reduced railway mail transportation pay under the act. In 1876 Congress reduced the maximum rates paid, by 10 per cent, and in the act so reducing the railway mail transportation pay provided for a commission to examine into the subject of the transportation of the mails by railroad companies. In 1877 this commission for examination of railway mail transportation was continued by act of Congress. In 1878 the maximum sums paid for railway mail transportation were further reduced 5 per cent. The question presented to Congress for its consideration from 1875 to 1879 was the compensation to be paid for railway mail transportation, and during these years it is apparent from the acts passed by it that careful consideration was given thereto. Congress determined that its manner of reducing railway mail transportation pay would be by reducing the maximum sum to be paid for railway mail transportation rather than by changing the method of finding the average daily weight of the mails. It could have followed either course but elected to leave the method of ascertaining the average daily weight as it was and to effect the reduction by lowering the maximum rate paid. It would pass the bounds of possibility to believe that Congress was not well informed as to the construction placed upon the act of 1873 by the Post Office Department.

"It is presumed that the legislature is familiar with the law and the construction placed upon it."

Sutherland Statutory Construction, vol. 2, p. 499.

Board *vs.* Holliday, 150 Ind., 216.

From 1873 to 1884 the number of railroads operating Sunday trains became more numerous, and a change in the construction of the act to make working days include Sundays would have materially benefited the Government, and in 1884 order No. 44 was issued by the Postmaster General, which is as follows:

"Order No. 44.—Hereafter, when the weight of mails is taken on the railroad routes performing service seven days per week, the whole number of days the mails are weighed, whether thirty or thirty-five, shall be used as a divisor for obtaining the average weight per day" (Rec., p. 44).

When order No. 44 was issued the then Postmaster General, having doubts either as to his power to change the wording of the statute by executive order or doubting whether the statute would bear such a construction, submitted the order to the Attorney General of the United States for an opinion as to its legality. The Attorney General in passing upon the legality of the order determined that it would be a departure from the law (Rec., pp. 35 and 36). Upon the rendering of the opinion by the Attorney General, order 44 was withdrawn, and from 1884 until 1905 those persons weighing mail for the periods of determining the average weight of mails per day continued to follow the construction placed upon the act from 1873 to 1884, as confirmed by the opinion of the Attorney General, and in doing so construed the words "working days" as meaning secular days and not Sundays, and where mail was carried on Sunday the weight of the mail so carried was added to the Monday weighing and Sunday was not included in the period during which the average weight was to be obtained.

Under the re-enactment of that part of the statute providing the method by which the average weight per day was to be obtained the Post Office Department continued to apply the same construction to the act as it had theretofore applied. At the time of the re-enactment in 1905 of that part of the statute under discussion the attention of Congress was directly called to the wording of the act and an effort was made to leave out of the act the words "working days," the following change being offered by the Committee on Post Offices and Post Roads:

"Provided, that hereafter before making the readjustment of pay for the transportation of mails on railroad routes, the Postmaster General shall have the mails on such routes weighed and the average weight per day ascertained for a period of not less than three consecutive months" (Rec., p. 37).

It would indeed be difficult to find a clearer illustration of a long-continued construction being placed upon a statute than that heretofore outlined. Not only was a construction placed upon the act by the Department required to enforce it, but such construction was disputed and after full consideration was submitted to the Department of Justice. After such submission to the Department of Justice and an approval by it of the construction placed upon the act by the Post Office Department, the Post Office Department continued to interpret the act as it had theretofore done for a period of 21 years prior to the re-enactment of the act in 1905.

Since the decision in *Stewart vs. Laird*, 1 Cranch, 299, it has been the settled policy of this court to give great weight to a contemporaneous and long-continued construction of a statute by the executive officers who execute it. This policy, as illustrated by the language of this court in some of the later cases, is as follows:

"The principle that the contemporaneous construction of a statute by the executive officers of the Government whose duty it is to execute it, is entitled to great respect and should ordinarily control the construction of the statute by the court, is so firmly embedded in our jurisprudence that no authorities need be cited support it. On the faith of a construction thus adopted, rights of property grow up which ought not to be ruthlessly swept aside, unless some great public measure, benefit or right is involved, or unless the construction itself is manifestly incorrect."

Pennoyer vs. McConaughy, 140 U. S., 1.

The reasons underlying the policy were recently analyzed by this court in the case of *United States vs. Mid-west Oil Company*, 236 U. S., 459-473, as follows:

"But government is a practical affair, intended for practical men. Both officers, lawmakers and citizens naturally adjust themselves to any long-continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but is the basis of a wise and quieting rule that, in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation."

Unless, therefore, the construction placed upon the act by the Department is manifestly erroneous this court will, in construing the act, adopt the construction placed upon the act by the Department from 1873 to 1907. This long-continued construction of the act by the Department, with the yearly approval by Congress thereof, would seem to be almost conclusive as to the construction which should be placed thereon.

There are, however, further elements in this case which would seem almost to preclude further controversy as to the construction to be placed upon the act. The act of 1873 became effective March 3, 1873, and from that time the mails were weighed thereunder for a period of 30 working days, and Sunday was not included in working days. If mails were carried on Sunday the weight thereof was added to the Monday weighing.

The act of March 3, 1873, was repealed June 22, 1874, by section 5596 of the Revised Statutes, and the provisions thereof were re-enacted in section 4002 of the Revised Statutes. This repeal and re-enactment of the statute occurred one year and a half, approximately, after the statute went into effect, and during this time the statute was construed by those who

were required to weigh the mails. It is presumed that Congress knew the construction placed upon the act by those persons weighing the mails, and in re-enacting the statute of 1873 Congress will be presumed to have adopted the construction placed upon it prior to that time.

United States *vs.* Cerecedo Hermanos y Compania,
209 U. S., 337:

"Counsel for the government also points out that the provisions of the tariff act of 1875 and subsequent acts were substantially similar to paragraph 296, and that the Treasury decisions thereunder were in accordance with the interpretation for which the government now contends. * * * We have said that, when the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the Department charged with its execution. * * * And we have decided that the re-enactment by Congress, without changes, of a statute which had previously received long-continued executive construction, is the adoption by Congress of such construction."

In 1905 Congress substantially re-enacted that part of section 4002 of the Revised Statutes which is now under consideration. From 1874 to 1905 the statute had been construed by the Department whose duty it was to carry it out. During each of these years the statute had received the particular attention of Congress at the time of the annual appropriation bill. Moreover, during this period there had arisen the dispute as to the proper construction of the act. Under these circumstances Congress will be presumed to have adopted the construction placed upon the act by the Department prior to its re-enactment in 1905.

"And again, when, for a considerable time a statute notoriously has received a construction under practice from those whose duty it is to carry it out, and afterward is re-enacted in the same words, it may be pre-

sumed that the construction is satisfactory to the legislature, unless plainly erroneous, since otherwise naturally the words would have been changed."

Copper Queen Consold. Min. Co. *vs.* Arizona,
206 U. S., 474-479.

"We make this concession because we think we are constrained to so do, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute."

N. Y., N. H. and H. R. Co. *vs.* Interstate Com.
Comm., 200 U. S., 361-401.

This statute has not only been re-enacted once, but twice, and each time after it had been construed by the Department called upon to enforce it. The construction placed upon the act prior to re-enactment in both instances was the same. The rule, therefore, that by re-enactment Congress adopts the previous construction placed upon the act is doubly operative in this case and would seem to almost absolutely proclude a change in construction.

There is still another element, even more strictly determinative of the construction to be placed upon the act than any heretofore discussed. In September, 1884, the then Postmaster General issued the following order:

"*Order No. 44.*—Hereafter, when the weight of mails is taken on the railroad routes performing service seven days per week, the whole number of days the mails are weighed, whether thirty or thirty-five, shall be used as a divisor for obtaining the average weight per day." (Rec., p. 34.)

October 22, 1884, the then Postmaster General addressed the following letter, the material parts of which are given, to the Department of Justice of the United States:

"SIR: The act of March 3, 1873, 17 Stat. L., p. 558, regulating the pay for carrying the mails on railroad routes, provides:

" 'That the pay per mile per annum shall not exceed the following rates, namely:

" 'On routes carrying their whole length an average weight of mails per day of 200 pounds, \$50; * * *

" 'The average weight to be ascertained in every case by the actual weighing of the mails for such a number of successive working days, not less than thirty.' " * * *

"Upon a large number of the railroad routes mails are carried on six days each week—that is, no mail is carried on Sunday. On others they are carried on every day in the year.

"It has been the practice since 1873 in arriving at the average weight of mails per day on these classes of service to treat the 'successive working days' as being composed of six secular or working days in the week, which is explained in the following illustrations:

"Two routes, Nos. 1 and 2, over each of which 313 tons of mail are carried annually.

"On route No. 1 mails are carried twice daily, except Sunday, six days per week, and are weighed 30 successive working days, covering usually a period of 35 days. The result is divided by 30, and an average weight of mails per day of 2,000 is obtained.

"On route No. 2 mails are carried twice daily, seven days per week and weighed for 30 successive working-days, and for the intervening Sundays, the weight on the Sundays being treated as if carried on Mondays, the weighing as before covering usually a period of 35 days. The result is divided by 30 and an average weight of mails per day of 2,000 pounds is obtained.

"I have thought it necessary to give the foregoing illustrations in order that the practice of this Department under the law cited may readily appear, and I will thank you to advise me whether that practice is in compliance with or in violation of the statute.

"If not in conformity with the law, will you please

indicate the correct method by which the average weight per day should be obtained and the compensation adjusted thereon?

"Very respectfully,

"FRANK HATTON,
"Postmaster General."

(Rea., pp. 34 and 35.)

October 31, 1884, the Department of Justice gave the following opinion upon the construction to be placed upon the method of obtaining the average weight per day of the mails:

"The Postmaster General.

"SIR: I have considered your communication of the 22nd instant requesting to know whether the construction placed by the Post Office Department on section 4002, subsection 2, prescribing the mode in which the average of the weight of mails transported on railroad routes shall be ascertained is correct, and am of the opinion that that construction is correct, and that a departure from it would defeat the intention of the law and cause no little embarrassment.

"I have the honor to be, your obedient servant,

"WM. A. MAURY,
"Acting Attorney General."

(Rec., pp. 35 and 36.)

It would indeed be difficult to more clearly present the question at issue in this case than it is presented in the letter of the Postmaster General of October 22, 1884. In paragraph 4 of the letter that part of the act to be construed is set up in the language of the statute. In paragraph 5 the Postmaster General points out that on some routes mail is carried 6 days in the week and on some routes mails are carried 7 days a week, and expressly states that on those routes on which mails are carried 6 days in the week, the day upon which mail is not carried is Sunday. In paragraph 6 the construction of the Department of the words "working days" is clearly set forth, it being stated that successive working

days had been treated by the Department as meaning 6 secular days. In paragraph 8 the method followed on routes over which mail is carried 6 days in the week is specifically set forth. In paragraph 9 the method followed on routes over which the mails were carried 7 days in the week, is specifically set forth, and it is pointed out that the mail carried on Sunday is treated as if carried on Monday.

The letter clearly and specifically asks whether the phrase "successive working days" means 6 secular days, and this is the question which is presented in this case.

The answer of the Department of Justice is equally clear, stating that the construction placed by the Post Office Department on the mode in which the average weight of mails is to be ascertained under section 4002 is correct and a departure from it would defeat the intention of the law. It would be impossible to put the question in a clearer form or to answer the question more definitely. This interpretation of the act by the Department of Justice was followed by the annual appropriation bill covering the railway mail compensation for 1884 and each successive year up to and including 1905. The method by which the compensation for railway mail transportation was figured was annually presented to Congress and was constantly before it for consideration.

This court has held that when prior to re-enactment the Department whose duty it is to enforce a statute has submitted the construction of the statute to the Department of Justice and a construction is placed by it thereon, that Congress will be presumed, in re-enacting the law, to have adopted the construction theretofore placed upon the act by the Department of Justice.

"The Attorney General having construed the proviso of section 50 of the act of 1890 as not restricted to the matter which immediately preceded it, but as of general application, and this construction having been followed by the executive officers charged with

the administration of the law, Congress adopted the construction by the enactment of section 33 of the act of 1897 and intended to make no other change than to require, as the basis of duty, the weight of the merchandise at the time of entry, instead of its weight at the time of its withdrawal from warehouse."

United States *vs.* Falk, 204 U. S., 143-152.

This is but another form of stating that when the words of a statute are subject to more than one construction, and the question of what is the proper construction has been raised by the Department required to enforce the law and presented by it to the Department of Justice for an opinion, and the Department of Justice has determined which of several constructions is the proper construction, then Congress, by a subsequent re-enactment of the statute without substantial change in the language, is presumed to have taken into consideration the claimed ambiguity in the wording used and the construction placed upon it by the Department of Justice, and to have adopted, by re-enactment, the construction placed upon the statute by the Department of Justice.

Perhaps a clearer statement of the rule is this: the presentation to the Department of Justice by the Department required to enforce the statute, of the question of the proper construction thereof, raises directly the determination of the meaning of the act; the placing of one construction on the act by the Department of Justice excludes a construction conflicting therewith; Congress, at the time of re-enactment, has knowledge that the wording of the act has been considered capable of two or more constructions and that a definite construction has been placed upon the act; it is, therefore, logically held that if Congress desired or intended any other meaning to be placed upon the act than that placed upon it by the Department of Justice, it would indicate its intention by changing the wording of the act, and by not so

doing shows clearly that the statute has but one meaning, which is that placed upon it prior to the re-enactment.

The present case clearly illustrates the principles involved. There were two classes of railway mail transportation; in the first class mails were transported 6 days in the week exclusive of Sunday; in the second class mails were transported 7 days in the week. The statute provided a method for obtaining the average daily weight of the mails, which had been construed as providing one method, which was equally applicable to both classes of railway mail transportation without change. The question was raised as to the correctness of the construction placed upon the act as applied to the first class and its correctness as applied to the second class. The Post Office Department presented these facts to the Department of Justice, and in so doing directly raised the question as to whether the words "working days" appearing in the statute meant secular days in determining the average weight of the mails carried on the first class and whether the words were to be construed in the same way in determining the average weight of mails on the second class. The Department of Justice construed the statute as meaning that the words "working days" meant secular days in determining the average weight of mails on both classes. The opinion of the Department of Justice, until superseded by a court decision or by act of Congress, fixed the meaning of the words construed, removing any question of ambiguity. Of this Congress knew and by using the words construed by the Department of Justice when re-enacting the statute, confirmed the construction placed upon them, and the statute comes before this court free from any question of ambiguity that might have existed prior to the re-enactment of 1905.

This case presents a remarkable series of facts bearing upon the construction to be placed upon that part of the act providing the method of ascertaining the average daily weight of the mails; first, there is a long-continued departmental construction, extending over a period of 34 years;

second, there is a construction of the act extending over a period of 1 year and a half, and then a re-enactment of the act by Congress, and following this is a departmental construction of the act for a period of 30 years and a re-enactment of the act; third, there is a departmental construction of the act, a presentation of this departmental construction to the Department of Justice for its opinion thereon, an opinion of the Department of Justice confirming the departmental construction as being the proper and legal construction and a re-enactment of the act by Congress after the rendering of the opinion by the Department of Justice. The first of these facts, unless the construction placed upon the law by the Department was erroneous, would, under the decisions of this court, control the construction to be placed upon the act. The second of these facts would, under the decisions of this court, remove all doubt as to whether the construction placed upon the act by the Department was erroneous, it being the province of Congress to determine the method to be pursued in obtaining the average weight of the mails, and by re-enactment Congress would show that the construction placed upon the act was not erroneous and that the method followed in obtaining the average weight of the mails was that intended by Congress.

The third fact would remove absolutely any question of ambiguity in the statute and would definitely fix the meaning of the statute as being that placed upon it by the Department of Justice prior to re-enactment, unless such construction was illegal, which is not claimed in this case.

It would therefore appear that under the decisions of this court, the act of 1905 is open to but one construction, namely, that in obtaining the average daily weight of the mails the mail should be weighed for a period of not less than 90 successive working days, and that Sundays should not be included within such weighing period, and the weight of the mail carried on Sunday should be added to the Mon-

day weighing, and that the lower court erred in not so holding.

III.

What, if any, discretion, did the Postmaster General have under the general law and under the act of 1873, as amended and re-enacted, to determine the method to be pursued in obtaining the average daily weight of the mails?

Neither the Post Office Department nor the office of Postmaster General is created by the Constitution of the United States. Both are created by act of Congress, under the authority given to Congress in the Constitution of the United States "to establish post offices and post roads." In construing, therefore, the authority of the Postmaster General it is necessary to always bear in mind that the power of the Postmaster General is not derived from the Constitution of the United States and is not equal to or coextensive with that of Congress, but is only that conferred by Congress.

"The office of Postmaster General is not created by the Constitution, nor are its powers or duties marked out by that instrument. The office was created by act of Congress; and wherever Congress creates such an office as that of Postmaster General, by law, it may unquestionably, by law, limit its powers, and regulate its proceedings; and may subject it to any supervision or control, executive or judicial, which the wisdom of the Legislature may deem right. There can, therefore, be no question about the constitutional powers of the executive or judiciary in this case."

Kendall vs. United States, 12 Pet., 524-626.

The authority, therefore, of the Postmaster General to act in any given case must be derived from specific acts of Congress, for from no other source can he, being the creature of Congress, derive power. Congress, in creating the office of

Postmaster General, specifically set forth the duties of the office. Section 396 of the Revised Statutes provides:

"Sec. 396. It shall be the duty of the Postmaster General: * * * Ninth. To superintend generally the business of the Department and execute all laws relative to the postal service."

And by sections 158 and 161 of the Revised Statutes Congress authorizes the Postmaster General to prescribe regulations, and expressly limits his authority to regulations consistent with the law.

Section 161. "The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

Section 161 only states in plain and unequivocal language that which is the law. As the power of the Postmaster General is derived from Congress, no regulation of his could supersede or change a regulation made by Congress. There is no general authority granted to the Postmaster General to act independently of Congress; his action must always be consistent with the directions given him by Congress.

The tendency of executive officers to attempt to modify or annul statutory regulations by regulations of their own, which they think serve better the purposes of government than the regulations prescribed by Congress, is exemplified by the following cases:

"The Secretary of the Treasury cannot, by his regulations, alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case, we are entirely satisfied the regulation acted upon by the Collector was in excess of the power of

the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock.' This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit, duty free, all animals specially imported for breeding purposes; the Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion, the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of a Treasury regulation."

Morrill vs. Jones, 106 U. S., 466.

"The authority of the Secretary to issue orders, regulations and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the Navy. He may, with the approval of the President, establish regulations in execution of, or supplementary to, but not in conflict with, the statutes defining his powers or conferring rights upon others. The contrary has never been held by this court."

United States vs. Symonds, 120 U. S., 46.

These are but two of many cases which have defined the limits of departmental regulation. The rule could not be different, for otherwise the Department would be superior to Congress. The following language of this court fixes the limits of departmental regulation:

"If rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation. The power of legislation was

certainly not intended to be conferred upon the Secretary."

United States *vs.* United Verde Copper Co.,
196 U. S., 207-215.

The general authority of the Postmaster General to execute the laws should not be confused with the power to define the terms of a law. The authority he has; the *first* second authority has never been granted to him. He cannot change a law or put a construction thereon which the law itself does not bear. The appellee would extend the general authority of the Postmaster General to superintend the business of the Department and execute the laws, to also cover the power to define and abridge the terms thereof, but cites neither statute nor authority to support this contention; nor can such authority, either statutory or judicial, be found, for the contention is erroneous. This part of the appellees' argument is manifestly fallacious, as it would give to the Postmaster General legislative power.

It, therefore, follows that the power of the Postmaster General to issue regulations is not general or unlimited, but is expressly limited by the provisions of the acts of Congress. The issue in this case turns upon regulation 412 of the Post Office Department, which directs the method of obtaining the average daily weight of the mails under the act of 1873 as amended and re-enacted. The authority, therefore, of the Postmaster General to issue the order depends upon whether it was consistent with the law at the time it was issued. The question presented is: Is order No. 412 inconsistent with the law as enacted by Congress? The statute is clear as to the authority given to the Postmaster General to readjust compensation to be paid for railway mail transportation. This authority is expressly limited to the conditions and rates mentioned in the act. As any other condition or rate than that specified in the act would be inconsistent with the authority granted to the Postmaster General, it is apparent that

the Postmaster General cannot change the conditions or rates mentioned in the act. The conditions of railway mail transportation are not at issue in this case, and it is therefore not necessary to discuss the statutory provisions concerning them. The statute provides the basis of pay for railway mail transportation. This sum is based upon the average weight of mails per day carried per mile per annum. The exact wording of the statute being:

“And that the pay per mile per annum shall not exceed the following rates, namely, on routes carrying their whole length an average weight of mails per day * * *.”

No discretion is given to the Postmaster General to change this mode of determining the pay for railway mail transportation, and any regulation issued by him providing for another or a different mode of obtaining the pay for railway mail transportation would be inconsistent with this provision and void; that is, the Postmaster General could not make the pay for railway mail transportation depend upon the monthly average of mails carried or in any other way change the method provided by the statute. The statute does fix the maximum sums to be paid for railway mail transportation after the average weight per day per mile has been determined, and leaves with the Postmaster General authority to pay a less sum than the maximum sum. This authority to pay a less sum than the maximum sum is distinct from an authority to determine the mode in which the average weight of mails per day per mile per annum is to be determined and should not be confused therewith. No authority is given to determine the mode; limited authority is given to fix the amount of pay per mile per annum. The statute further fixes the method of determining the average weight of the mails, the exact wording of the statute being as follows:

“The average weight to be ascertained in every case by the actual weighing of the mail for such a number of successive working days, not less than 30, * * *.”

This section clearly prescribes the method of obtaining the average weight per day of the mails and gives to the Postmaster General no discretion as to the method to be employed. It does give him limited discretion to determine the maximum number of working days to be included in the weighing period. The statute is uniform in providing the unit to be used in determining the pay of railway mail transportation and the unit to be used in determining the average daily weight of the mails and also is uniform in leaving to the Postmaster General a limited discretion in fixing in one instance the amount to be paid per unit after the unit has been determined and in the other instance in leaving to the Postmaster General a limited discretion in determining the number of units, not the kind, to be included in the weighing period.

"Expressio unius est exclusio alterius is a universal maxim in the construction of statutes."

United States *vs.* Arrendondo, 6 Pet., 691-725.

By leaving to the Postmaster General limited authority to fix the amount of railway mail transportation pay after the average weight of mails per day per mile per annum had been determined, Congress clearly indicated that it intended to leave no other element therein to the discretion of the Postmaster General. By leaving to the Postmaster General limited authority to fix the number of units composing the weighing period, Congress clearly indicated that it did not intend to leave to the discretion of the Postmaster General any other element of the method of determining the average weight of the mails.

It therefore follows that the Postmaster General had no authority to change or modify the method provided in the statute of determining the average daily weight of the mails except as he might increase the number of working days

comprising the weighing period. He had no power to change the kind of day to be included in the weighing period, and as the statute directs that the weighing period shall consist of "working days" he could not include in the weighing period other days than working days, by departmental regulation or order.

If, therefore, the ordinary meaning of the words used in the statute prescribing the method by which the daily average weight of the mail shall be obtained is given to them, and this court holds that the weighing period provided for in the statute shall consist of secular days and not Sundays, then order No. 412, which provides that the weighing period shall consist of Sundays as well as secular days, is inconsistent with the statute and is null and void.

If this court holds that by re-enacting the provision by which the method of determining the average daily weight of the mails was provided, Congress adopted the construction theretofore placed thereon by the Post Office Department and the Department of Justice, under which the weighing period was determined to consist of secular days and not Sundays, then order 412, which provides that the weighing period shall consist of Sundays as well as secular days, is inconsistent with the statute and is null and void.

IV.

Is appellant estopped from claiming compensation under the statute for carrying the mails because it, after protest, carried the mails and accepted pay therefor based upon Order No. 412?

Appellee contends that appellant is estopped from claiming compensation under the statute, and bases its contention upon the cases of:

Eastern Railroad Co. *vs.* United States, 129 U. S., 391.

C. M. and St. P. Ry. Co. *vs.* United States, 198 U. S., 385.

A. T. and S. F. Ry. Co. *vs.* United States, 225 U. S., 64.

In the case of *Eastern Railway Co. vs. United States, supra*, the facts are materially different from those in the case at bar; first, no question arose in that case as to the legality of the order issued by the Postmaster General making the reduction in the pay for transporting the mail; the order so issued was in accordance with the terms of the act of 1878; second, no protest was made by the railway company objecting to the pay received thereunder by it; third, the railroad was not a land-grant railroad and was not compelled to carry the mails. A change in any one of the above facts would be sufficient to take this case out of any rule established by the former case. It should be noted, however, that no rule as to estoppel, as claimed in this case, was established by the *Eastern Railroad Co. case*. The court first determined that the Postmaster General could legally make the reduction in the rate of pay, and thus recognized the necessity of first determining the legality of the action of the Postmaster General before considering the question of estoppel, and then held that inasmuch as the action of the Postmaster General was legal, an estoppel would arise as to the railroad company by an acceptance of pay for the transportation of the mail without protest. This distinction is recognized in the case of

D., L. & W. Ry. Co. vs. United States, 249 U. S., 385.

In the case of *C., M. and St. P. Ry. Co. vs. United States, supra*, the facts are not similar to those in the case at bar in that; first, no protest was made against the order of the Postmaster General under which the railroad received pay for railway mail transportation; second, that the railroad was not a land-aided railroad and was not compelled to carry the mails. A change in either one of these facts would take the present case out of any rule established in the former case. The remainder of the facts in the former case are similar to those in the present case. An order was issued by the Post Office Department which the railroad claimed was contrary

to the terms of the statute and insisted that it should be paid for the transportation of the mail under the terms of the statute. It should be noted that the court first determined that the order issued by the Postmaster General was within his power under the statute and was not illegal, thus recognizing the necessity of first determining the question of the legality of the action of the Postmaster General, and then discussed the question of estoppel.

In the case of the A., T. & S. F. Ry. Co. *vs.* The United States, *supra*, the facts are not similar to those in the case at bar, in that the railroad in that case was not a land-aided railroad and was not compelled to transport the mail. A protest was made in that case against the order of the Postmaster General, by which it was claimed that the order was in violation of the statute and that the railroad should be paid for the transportation of the mails under the statute. It should be noted that the court determined, first, that the order complained of was within the terms of the statute and the authority of the Postmaster General, thus recognizing the necessity of first determining the legality of the action of the Postmaster General, and then discussed the question of estoppel.

In all three of the cases the court first determined whether the order complained of was legal or illegal and then passed upon the question of estoppel. This would necessarily be so, for the reason that the statute regulating railway mail transportation is a part of any contract, express or implied, existing between the railroad companies and the Government. If the facts herein establish an express contract then the statute is a part thereof. If the facts herein establish an implied contract, then the terms of the statute will govern the consideration to be paid.

"Where an agent is appointed by law to contract for the State, the law under which he acts is as much a part of the contract made by him as if it were formally embodied in the contract."

36 Cye., 872.

"Provisions of law applicable to the subject-matter of contracts are parts of the contract, whether so expressed or referred to or not.

"Where a law authorizes the regulation of service rendered the public, such law becomes a part of and controls contracts provided for the public service."

State *ex rel. Ellis vs. Tampa Water Works*, 56 Fla., 858-871.

"Our statute books are filled with acts authorizing the making of contracts with the Government through its various officers and departments but, in every instance, the person entering into such contract must look to the statute under which it is made, and see for himself that his contract comes within the terms of the law."

Pierce vs. United States (The Floyd acceptances), 7 Wall., 666-680.

The cases first cited are all authority for the consideration by this court of the question raised in this case as to the legality of order No. 412.

If this court finds that order 412, issued by the Postmaster General, was in accordance with law, then there is an end to this case. If this court finds that order 412 is inconsistent with the act of 1873, as amended and re-enacted, then no estoppel could arise, for the reason that the terms of the act would govern the compensation to be paid appellant for railway mail transportation.

In any event, no estoppel arises as to appellant, for the reason that it is a land-aided road and was compelled to transport the mails.

V.

The Post Office Department, in finding the average daily weight of the mails under order No. 412 on six-day routes, included in the weighing period, which was the divisor, Sundays, upon which no work was done. In so doing there

was a direct violation of the statute, for under the broadest construction of the words "working days", days upon which work was not done, could not be included in the weighing period. There could be, on six-day routes, but 90 working days in 105 successive days. In including in the weighing period the 15 Sundays upon which mail was not carried and was not weighed, the Post Office Department reduced the average daily weight of the mails carried by one-seventh and appellant's compensation by an equal amount. Unless this court reads out of the statute the word "working" it would seem clear that the case must be reversed as to the compensation to be paid appellant on six-day routes and therefore no further discussion of this point would seem necessary.

VI.

An analysis of the opinion filed herein in the court below as determining the following questions:

1. The construction of the words "working days."
2. The effect to be given to the reenactment of 1905.
3. The authority of the Postmaster General.
4. Is the statute directory or mandatory?
5. Is appellant estopped from recovering in this case by its receipt of pay for railway mail transportation? (This has been fully considered in section IV of this brief.)

The opinion of the lower court does not contain a construction of the words "working days." It apparently assumes, without consideration, that the words "working days" mean any day, including Sunday. It does not dispute that the commonly accepted meaning of the words does not include Sundays but includes secular days only. It sets forth no reason why the ordinary meaning of the words should not be attached to them in the act in question. Without such an explanation the entire opinion is without foundation, for, as is admitted in the opinion itself, the Postmaster General

had no authority to construe the law and necessarily no authority by construction to change the law.

"Their contention leads to the conclusion that the Postmaster General gave an authoritative and final construction of the statute. This, we think, is beyond his power. The statute does not confer the power of legislation, nor can the exercise of the power have the effect of legislation" (Record, p. 71).

The court adopts a strained construction for the words without giving any reason therefor. The opinion passes, without comment or discussion, the first important question in this case, and then having adopted an unreasoned premise, proceeds to build an argument thereon. The opinion, therefore, is without weight until it is determined what is the meaning of the words "working days." If this court gives to the words their ordinary meaning, then, under the opinion of the lower court, which in this respect is sound, the Postmaster General would have no power, by rule or regulation, to change the meaning of the words, and order 412 would be illegal and void.

The second element to be disposed of is the effect to be given to the re-enactment in 1905 of that part of the act of 1873, providing the method by which the average weight of the mail per day should be determined. The opinion of the lower court nowhere confutes the following facts: that from 1873 to 1884 no question had arisen as to the meaning of the act of 1873, and the Post Office Department had interpreted the act to mean that only secular days were to be included in the weighing period; that after the opinion of the Attorney General was rendered in 1884 and up to the time of the re-enactment of the law the same interpretation had been placed upon the act; that Congress was presumed to know the interpretation that had been placed upon the act. The lower court recognizes that this court has held that by the re-enactment of an act Congress adopts the interpretation

theretofore placed upon the act. The lower court could not come to any other conclusion, for the cases upon this branch of the law are too clear and certain to avoid admitting the rule as established by this court. The lower court picked three cases which dealt with the Treasury Department (Rec., p. 73), and then claimed (Rec., pp. 73-74) that all the cases establishing the rule above set forth were cases dealing with the Treasury Department, and that the rule was limited to cases involving the Treasury Department. The power and authority of the Secretary of the Treasury and of the Treasury Department springs from identically the same source that the power and authority of the Postmaster General and the Post Office Department springs from. In the same section the Constitutional Congress is authorized to legislate regarding each of these Departments. The rules of law, therefore, governing the construction of the acts of Congress giving authority to the Secretary of the Treasury and the Postmaster General would be the same. If, therefore, it was the fact that the decisions of this court were confined to decisions dealing with cases arising in the Treasury Department, nevertheless, such cases would be authoritative for cases arising in the Post Office Department. It is not, however, the fact that all the cases cited by appellant to support its claim, that Congress by re-enactment adopted the construction theretofore placed upon the act, arose as to action taken by the Treasury Department. On the contrary, the rule so stated is of general application, as note the cases heretofore cited of *N. Y., N. H. & H. R. Co. vs. Interstate Commerce Commission*, *supra*; *Copper Queen Consolidated Mining Co. vs. Arizona*, *supra*. The first of these cases applies the rule to the Interstate Commerce Commission, and in it this court recognizes the rule as being applicable to all laws passed by Congress. The second case applies the rule to the adoption by one State of a statute from another State, and holds that the construction placed upon the statute in the State from which it is adopted is the construction which is to be placed upon the statute in the

adopting State. To uphold the decision of the lower court as to the effect of re-enactment, where there has been a previous construction of the act re-enacted, will reverse a well-established principle of law recognized by this court and will change the same rule, based upon the decisions of this court, in practically every State in the Union. To uphold the decision of the lower court this court must reverse the long line of authorities holding that by re-enactment Congress adopts the construction theretofore placed upon the act upon which many property rights rest. There is no element in this case which makes it an exception to the general rule.

The third element to be disposed of is the authority of the Postmaster General. As has heretofore been shown in this brief, the authority of the Postmaster General is derived from acts of Congress, and therefore any authority that is claimed for him must be based upon existing acts of Congress. The opinion of the lower court speaks of the general authority vested in the Postmaster General by Congress, but fails to point out the specific acts of Congress by which this general authority is granted to the Postmaster General. In the absence of any act granting general authority it would not be presumed that any such authority existed. Moreover, as to railway mail transportation, this court has recognized that the authority of the Postmaster General is not a general authority, but is limited by the terms of the act.

"The section does not sustain the appellant's contention. The Postmaster General is given the power to arrange the railway routes upon which the mail is to be carried, and to adjust and readjust compensation. The orders of December 1 and December 3, respectively, reserved this power, and the only limitations on its exercise, expressed in section 4002, is as to the manner of ascertaining the rate, which is to be by the average weight of the mails."

C., M. & St. P. Ry. *vs.* United States, 198
U. S., 385-389.

It therefore follows that the lower court erred in holding that the Postmaster General had general authority as to the manner of ascertaining the rate. Such authority is limited by section 4002 of the Revised Statutes, which is that part of the act of 1873 providing the method of obtaining the average daily weight of the mails.

The opinion of the lower court is based upon the theory that inasmuch as the Postmaster General had authority to interpret the act at one time he must necessarily have equal authority to change the interpretation of the act whenever he thought it advisable so to do. This appears clearly on page 66 of the record in the following language of the opinion:

"It is clear that if the law permitted him to adopt a course of action which to him seemed just the original adoption of it or the continuance of the usage could not take away or limit the right, duty, or powers of his successors to act independently when in their wise discretion changed conditions seemed to warrant a change in the usage. Charged with the same or similar duties and responsibilities, his successors were vested with the same powers he had. Usage alone would not make it mandatory, and, except that a change in the usage would not be allowed to affect the rights acquired under a previous usage, its alteration cannot be prevented by parties whose claims arise after full notice of the change."

This part of the court's opinion shows the difficulty the lower court faced in supporting the legality of Order No. 412. The court could not and did not question the correctness of the interpretation placed upon the act prior to 1907. The opinion is not based upon the wording of the act or the intention of Congress. The court recognizes that as conditions existed from 1873 to 1907 the proper interpretation of the act was that claimed by appellant. It rests its opinion upon the fact that the increase in routes upon which mail was carried upon Sunday was very great between 1873 to 1907,

and that therefore the interpretation of the statute should be changed:

"In the hearing before a congressional joint committee in 1914, it is shown that in 1873 there were 684 six-day routes and only 97 seven-day routes. The aggregate mileage of the first class was then approximately 48,000 miles and of the latter 15,000 miles. The annual pay to the six-day routes was approximately four and three-quarters millions and to the seven-day routes it was approximately two and a half millions of dollars. Charged with the duty mentioned the Postmaster General found the daily average weights, as has been stated, and his action was followed until 1907. When he came to consider the situation in 1907 he found, instead of 684 six-day routes as in 1873, that they had increased to about 1,394 in number, with an aggregate mileage of about 49,000 miles, while the seven-day routes had increased in number from 97 in 1873 to about 1,600 in 1907, with an aggregate mileage of 153,000 miles. While, therefore, the six-day routes about doubled in number in the 34 years, the seven-day routes had increased by about 16 times their number during the same period. * * *

"If by the act of 1905 there was to be a longer period of weighing by which to get, as was supposed, a fairer average of weights, and only one divisor was to be used, it cannot be reasonably affirmed that a fairer average is not attained when, considering all the routes, the basis is laid upon the class which is greatest in number and handles the larger weights." (Rec., p. 72.)

The desirability of a change is not based upon any inconvenience that resulted from changed conditions in obtaining the weight of the mails; the method followed in obtaining the weights is identically the same under Order 412 as was followed prior to the issuance of the order. The opinion does not proceed upon the idea that Order 412 simplified former methods or made applicable to present condi-

tions an antiquated method of obtaining the weights. The opinion recognizes that the sole purpose of the order is to reduce by departmental regulation the amount of money paid for railway-mail transportation. If changed conditions make the application of an act of Congress irrational or unjust, it is the province of Congress to change the law so that it will apply to changed conditions and is not within the power of the Department to effect a change by departmental regulation.

"Perhaps Congress may have acted under a mistaken idea, that color would always indicate quality. Perhaps, up to the time that the law was passed, as the processes of manufacture had been conducted, color was an approximate or general indication of quality. Suppose this to be so, does it derogate from the fact, that color was the standard which Congress, with the lights which it had, saw fit to adopt? Does it not tend to fortify that fact? If it be found by experience that the standard is a fallacious one, can the Executive Department supply the defects of legislation? Congress alone has the authority to levy duties. Its will alone is to be sought."

Merritt vs. Welsh, 104 U. S., 694.

It therefore follows that that part of the lower court's opinion, which bases the authority of the Postmaster General to effect a change in the law by departmental regulation upon changed conditions, is manifestly erroneous.

The fourth element upon which the opinion of the lower court is based is that the statute of 1873 as amended and re-enacted is directory and not mandatory and that therefore the Postmaster General could take such action under it as to him seemed best. The character of the act has been discussed in section 1 of this brief, but as it was there discussed from a somewhat different angle than the court treats it, a further consideration of the question may throw light thereon.

The cases cited by the lower court to support that part of its opinion which holds that the act was directory, sustain

the general rule that the act must be examined to ascertain the intention of the legislature. The lower court does not analyze the statute, but contents itself with the statement that the act is directory. A consideration of the statute itself, appellant believes, will negative the opinion of the court. The statute "authorizes and directs" the Postmaster General "to readjust the compensation hereafter to be paid for the transportation of mails * * * upon the conditions and at the rates hereinafter mentioned," and then provides "that the pay per mile per annum shall not exceed the following rates, namely; on routes carrying their whole length an average weight of mails per day of 200 pounds, \$50; * * * the average weight to be ascertained by the actual weighing of the mails for such a number of successive working days, not less than 90 * * *."

Is the act mandatory or directory? Did the Postmaster General have to readjust the compensation for the transportation of the mails or did he not? It is submitted that after the passage of the act, the Postmaster General had no discretion as to readjusting the pay for railway mail transportation. The act not only authorized him to do so but directed him to do so. It is apparent from the wording of the act that generally the act is mandatory and not directory. It then remains to be considered whether the provisions of this generally mandatory act are in part directory. With the conditions of railway mail transportation we are not interested. With the rates of railway mail transportation pay we are interested. We note that the word in that sentence prescribing the rate per mile per annum to be paid by the Postmaster General, which indicates whether he can exercise discretion as to the amount to be paid, is the word "shall." The statute reads "the pay per mile per annum shall not exceed * * *," and so an implication would arise that this part of the act is mandatory and not directory. Furthermore, the act itself fully confirms this implication, and we do not think it can be contended that the Postmaster

General could pay more than the maximum rates prescribed by the statute. It is also to be noted that in re-enacting in 1905 that part of the law providing the method by which the average weight is to be ascertained the word "shall" is used, and so the same implication arises as to the mandatory character of that part of the act providing the method of ascertaining the average weight of the mails, there being no substantial change in the wording of the act. In the act of 1873 that part of the statute providing the method by which the average weight was to be obtained was part of that part of the sentence providing the rate to be paid and so was governed by the word "shall" as used in the first part of the sentence. The act of 1905, however, by using the word "shall" with respect to the method of obtaining the average weight, removes any question as to the implication arising as to the character of this part of the act. We do not presume that it will be contended on the part of the appellees that the Postmaster General could make the weighing period consist of less than 90 days, and therefore in this respect the act is mandatory. We do not believe that it could be seriously contended that that part of the act requiring the weighing period to consist of "successive" working days is directory and not mandatory, and that the Postmaster General could select Tuesdays and Wednesdays as being the days which should compose the weighing period, or Sundays as being the days which should compose the weighing period, or in any other manner change the successive character of the days which would compose the weighing period. As to this feature of the act it seems to be apparent that the weighing period had to be a continuous one of the days required, and the Postmaster General had no authority to select here a day and there a day in making up the weighing period. If the above analysis is correct, the only part of the act prescribing the rate to be paid, which under any circumstances could be directory, is that part of the act specifying the kind of days which should compose the weighing period, and we

respectfully submit that inasmuch as the statute makes no distinction as to the elements composing the method of ascertaining the average daily weight of the mails that it was not the intention to make the provisions generally mandatory and one only directory. It is also called to the attention of the court that the language, "successive working days," is a phrase and that if part of the phrase is mandatory all of the phrase is mandatory, and one word could not be picked out from the phrase and the act, as to that word, held to be directory. It is, therefore, submitted that an analysis of the act itself does not sustain the opinion of the lower court, that the act is directory and not mandatory, but on the contrary shows clearly that the act is a mandatory act.

An analysis of the various cases cited by the lower court in support of its contention that the act is directory will show that in each and every case the act which is found to be directory did not deal directly with the matter in issue but with some collateral matter, and that in almost every case the court decides that the act held to be directory was not part of the contract which was in issue. The courts recognize that where the execution of the act, the performance of which is claimed to be directory, affects directly the rights of third persons, and is not an act provided simply for the convenience of Government officials in executing some law, that then the law is in all cases mandatory. The case of

United States *vs.* De Visser, 10 Fed., 642-648,

cited by the lower court as upholding its contention as to the character of the act, clearly recognizes this distinction, as note the following language appearing on page 648 of the opinion:

"But, on the other hand, statutes which are not designed to affect the rights or liabilities of third parties, but are designed only to direct the officers of the Government in the performance of their duties

for its own protection and security merely, are construed as directory to them only, and as not creating any obligation to the surety in the bond, nor as forming any part of the contract of Government with him."

"There are, undoubtedly, many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such, generally, are regulations designed to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory, unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise."

French vs. Edwards, 80 U. S., 506.

In the present case, if the act is executed according to the construction placed upon it from 1873 to 1907, one sum is paid to the railroads; if the act is executed according to the construction placed on it under Order No. 412, a greatly reduced sum is paid to the railroads. The act therefore would be mandatory, for a change in its construction materially affects the rights of third persons, namely, the railroads. It would seem that the lower court overlooked the distinction between acts under which third persons acquire rights and acts which simply affect Government officials in the execution of their duties, and in so overlooking such distinction failed to apply the proper rule to the statute under

consideration, and in holding the act directory its opinion was erroneous.

The act, so far, has been discussed generally. The conditions under which appellant's predecessor, the Northern Pacific Railroad Company, was incorporated and the conditions under which it received from the United States the land by the means of which part of its railroad was constructed, placed appellant in an entirely different position with respect to the act of 1873 as amended and re-enacted, from that occupied by railroads which are not organized under the laws of the United States and are not land-aided, and make the act, as to it, mandatory.

The terms of the act under which appellant received the land which was granted to it by Congress provided that it should transport the mails over its road "at such price as Congress may by law direct." The Northern Pacific Railroad Company, the predecessor of appellant, was incorporated under the laws of the United States, and by the act of its incorporation it was made a post route and made "subject to such regulations as Congress may impose, restricting the charges for such Government transportation."

In so far as appellant is concerned, it would seem clear that the act of 1873 as amended and re-enacted was part of its contract with the Government, and that if the Postmaster General refused to readjust the compensation paid for the transportation of the mails under the act of 1873 that appellant could by mandamus compel him so to do. It is further apparent that appellant could compel the Postmaster General to readjust such compensation upon the "pay per mile per annum," and that if the Postmaster General refused so to readjust, mandamus would lie. It would seem clear from the wording of the act that if the Postmaster General endeavored to obtain the average weight of the mails by selecting the Tuesdays and Wednesdays of each week to comprise the weighing period, that appellant could by mandamus compel the Postmaster General to obtain the

average weight by using "successive" days. It seems clear, also, that if the Postmaster General attempted to obtain the average weight by using a weighing period of less than 90 days that the appellant could force him to obtain the average daily weight of its mails by using a weighing period of not less than 90 days. The statement of these several propositions carries the argument for each with it. It could hardly be contended that appellant could insist upon the performance by the Postmaster General of each of the above terms of the statute and could not equally insist that the weighing period consist of "working days." If appellant could insist upon the successive character of the days to be included in the weighing period it could insist upon the kind of days to be included in the weighing period. If appellant could insist upon the minimum number of working days to be included within the weighing period, it could insist upon the kind of days to be included in the weighing period. It therefore follows that as to land-grant routes the statute is mandatory as to the character of the days to be included in the weighing period, and that if the words "working days" mean secular days then appellant can insist that the weighing period be composed of secular days.

Conclusion.

It is, therefore, respectfully submitted that the decision of the lower court should be reversed, with directions to compute judgment for appellant in accordance with the following principles:

1. On routes on which mail is carried six days in each week, in determining the average daily weight of the mail, the weighing period shall consist of days upon which mail is carried, and the total weight of the mail carried during the weighing period shall be divided by the total number of

days upon which mail is carried to find the average daily weight.

2. On routes on which mail is carried seven days in each week, in determining the average daily weight of the mails, the weighing period shall consist of working days, and mail carried on Sunday shall be treated as Monday mail and the weight thereof added to the Monday weighing, and the total weight of the mail carried during the weighing period shall be divided by the total number of working days composing such weighing period to find the average daily weight.

Respectfully submitted,

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THE MAIL DIVISOR CASES.¹

APPEALS FROM THE COURT OF CLAIMS.

Nos. 109, 132, 133, 232. Argued December 17, 18, 19, 1919.—Decided January 12, 1920.

The Act of March 3, 1873, c. 231, 17 Stat. 558, in appropriating "for increase of compensation for the transportation of mails on railroad routes," directed the Postmaster General to readjust such compensation thereafter to be paid "upon the conditions and at the rates hereinafter mentioned," thereupon providing that the pay per mile per annum "shall not exceed" certain specified sums graded according to average weights of mails carried per day, and further that "the average weight . . . be ascertained, in every case, by the actual weighing of the mails for such a number of successive working-days, not less than thirty [by Act of March 3, 1905, c. 1480, 33 Stat. 1082, 1088, increased to ninety], at such times . . . not less frequently than once in every four years, and the result . . . be stated and verified in such form and manner, as the Postmaster-General may direct."

Held: (1) The rates specified are the *maxima*; and the act leaves it discretionary with the Postmaster General, to fix lower rates in contracting with railroads. Holmes, J., p. 329; Pitney, J., p. 335.

(2) The aim of the weighing provision is to obtain the daily average for the year; the "working-days" and the weighing-days (whether including Sundays or not,) are identical; and inasmuch as the mileage of seven-day routes now greatly exceeds that of six-day routes, the Postmaster General, in the exercise of his discretion over rates, may adopt a general rule, to use in all cases the whole number of days of the weighing period, Sundays included, as a divisor for obtaining the average weight, instead of omitting Sundays from the

¹ The docket titles of these cases are: *Northern Pacific Railway Company v. United States*, No. 109; *Seaboard Air Line Railway v. United States*, No. 132; *New York Central & Hudson River Railroad Company v. United States*, No. 133; and *Kansas City, Mexico and Orient Railway Company of Texas v. United States*, No. 232.

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divisor as was done when the six-day routes predominated. Holmes, J., p. 331.

The statute prescribes that the aggregate weight for the weighing period shall be divided by the number of "working-days"—meaning week-days—included in the period; but this is directory only, so that a failure of the Postmaster General to follow this method strictly in fixing rates will not render his action void. Pitney, J., pp. 335-337.

The provision of the Act of July 12, 1876, c. 179, 19 Stat. 79, reducing the compensation "ten per centum per annum from the rates fixed and allowed," and the similar provision of the Act of March 2, 1907, c. 2513, 34 Stat. 1212, refer to the statutory maximum rates, and did not impair the discretion of the Postmaster General to fix lower rates. Holmes, J., pp. 330, 333; Pitney, J., p. 338.

So also of the like provision in the Act of June 17, 1878, c. 259, 20 Stat. 142. Pitney, J., p. 338.

The former practice of the Postmaster General of allowing the railroads the full statutory rates and average weights derived through a divisor excluding Sundays, was an exercise of his discretion in determining the pay, and not an interpretation of the statutes as requiring that the pay be so determined. Holmes, J., p. 332.

Rejection by Congress of amendments requiring the divisor to be the number of weighing days is not an interpretation of the existing law as forbidding that method. Holmes, J., p. 333.

Prior to the Act of July 28, 1916, c. 261, 39 Stat. 429, railroad companies which had not been aided by grants, or otherwise, were free to refuse to carry the mails at rates offered. Pitney, J., p. 339.

Railroad companies which receive and transport the mails and accept the compensation with knowledge that it is readjusted under a rule insisted upon by the Postmaster General, whereby the whole number of days in the weighing period, including Sundays, is used as a divisor in obtaining the average weights, cannot afterwards repudiate their contracts and claim a larger compensation because the week-day divisor was not employed, as directed by the statute. Pitney, J., p. 339.

The same considerations apply to land-grant railroads, under duty to carry the mail at the prices fixed by law, and which by statute are to receive a certain percentage of the pay authorized in other cases; it not appearing that the Postmaster General acted arbitrarily or discriminated against them, or fixed the pay at non-compensatory amounts. Pitney, J., p. 340.

53 Ct. Clms. 258, affirmed.

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THE cases are stated in the opinions.

Mr. Alexander Britton, with whom *Mr. C. W. Bunn* and *Mr. Evans Browne* were on the brief, for appellant in No. 109.

Mr. Benjamin Carter, with whom *Mr. James F. Wright* was on the brief, for appellant in No. 132.

Mr. Frederic D. McKenney, with whom *Mr. John Spalding Flannery* was on the brief, for appellant in No. 133.

Mr. F. Carter Pope for appellant in No. 232.

The Solicitor General and *Mr. La Rue Brown*, Special Assistant to the Attorney General, with whom *Mr. Joseph Stewart*, Special Assistant to the Attorney General, was on the briefs, for the United States.

Mr. William R. Harr and *Mr. Charles H. Bates*, by leave of court, filed a brief as *amici curiæ*, in No. 109.

Mr. Abram R. Serven and *Mr. Burt E. Barlow*, by leave of court, filed a brief as *amici curiæ*, in No. 109.

Mr. L. T. Michener, by leave of court, filed a brief as *amicus curiæ*, in No. 132.

Mr. R. Stuart Knapp, by leave of court, filed a brief as *amicus curiæ*, in No. 132.

MR. JUSTICE HOLMES announced the judgment of the court and delivered the following opinion, concurred in by the CHIEF JUSTICE and JUSTICES BRANDEIS and CLARKE.

These are claims for compensation for carrying the mails above the amounts allowed and paid by the Postmaster General. The four cases are independent of one another,

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but as the claims all depend for their validity upon a denial of the Postmaster General's power to pass a certain order they may be considered together. They were rejected by the Court of Claims. The question shortly stated is this. The pay for carrying the mails is determined by the average weight carried. To ascertain this average the mails are weighed for a certain number of consecutive days, and for some time before 1907 the total weight was divided by the number of working days—if the number of days was thirty-five it was divided by thirty, if one hundred and five by ninety. But on June 7, 1907, the Postmaster General issued an order, No. 412, "that when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day." This of course diminishes the average weight and therefore the pay of the railroads. They deny the authority of the Postmaster General to make the change and sue for the additional sum that under the old practice they would have received.

The texts to be discussed begin with an Act of 1873, but it should be observed as furnishing a background for that and the following statutes that from the beginning of the Government the Postmaster General, as the head of a great business enterprise, always has been entrusted, as he must be, with a wide discretion concerning what contracts he should make, with whom and upon what terms. It is needless to go into the early statutes or to do more than to refer to Rev. Stats., § 3999, which authorizes him to make other arrangements if he cannot contract for the carriage of the mail upon a railway route at a compensation not exceeding the maximum rates then established, or for what he deems reasonable and fair. The limitations upon the power were in the interest of the business, the principal one being that the pay per mile per annum should not exceed certain rates. Act of June 8, 1872, c. 335, § 211,

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17 Stat. 283, 309; Rev. Stats., §§ 3998, 4002. The language plainly showed and the decisions have established that the Postmaster General, if it seemed to him reasonable, could refuse to pay the maximum and insist upon some lesser rate as a condition of dealing with a road. *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 225 U. S. 640, 649.

The Act of March 3, 1873, c. 231, 17 Stat. 556, 558, appropriates five hundred thousand dollars, or so much thereof as may be necessary, "for increase of compensation for the transportation of mails on railroad routes upon the condition and at the rates hereinafter mentioned." Then, after providing for due frequency and speed and suitable accommodations for route agents—matters on which obviously the Postmaster General is the person to be satisfied—it enacts that "the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars; five hundred pounds, seventy-five dollars," &c., &c. So far it will be seen that although the object is to permit an increase of compensation still the discretion of the Postmaster General under the earlier acts remains and that he could decline to pay the maximum rates, however ascertained, or any sum greater than he should deem reasonable. It is argued, to be sure, that the rates were fixed at the maximum, and the Act of July 12, 1876, c. 179, 19 Stat. 78, 79, reducing the compensation "ten per centum per annum from the rates fixed and allowed" is thought to help the conclusion. But no argument can obscure the meaning of the words "shall not exceed." The rates were fixed and reduced in their maxima but that was all that was done with regard to them. *United States v. Atchison, Topeka & Santa Fe Ry. Co.*, 249 U. S. 451, 454. The question is whether for any reason the control over the compensation thus undeniably given to him

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without imposing any downward limit as to the money rates, is wholly withdrawn from his judgment in the preliminary stage of determining the basis to which the money rates are to be applied.

The next words of the statute are: "The average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working-days, not less than thirty, at such times" &c., "and the result to be stated and verified in such form and manner, as the Postmaster-General may direct." The pay it will be remembered was to be per mile per annum, and as it was not practicable to weigh all the mails throughout the year and so to find out the total actual weight of the mails and the exact number of miles that they were carried in the year, the result had to be arrived at approximately by finding the average weight carried on days assumed to resemble the other days of the 365. The average to be reached was not an average for the thirty days but an average weight per day for the year. This interpretation is shown to be the understanding of Congress by the Act of July 12, 1876, c. 179, 19 Stat. 78, 79, which reduces the compensation ten per centum per annum from the rates fixed and allowed by the Act of 1873 "for the transportation of mails on the basis of the average weight." This must mean the average weight for the year concerned. Again by the Act of March 3, 1905, c. 1480, 33 Stat. 1082, 1088, "the average weight [i. e., of course, the average weight for the year] shall be ascertained by the actual weighing of the mails for such a number of successive working days not less than ninety" &c., the increase in the number of days manifestly being for the purpose of more nearly hitting the average for the whole time. The statutes do not mention the divisor to be used in order to get the average desired. In 1873 mails were not carried on Sundays except over a comparatively small proportion of routes and therefore six was the fairest single divisor.

Now, on the other hand, it is said that the mileage of the seven-day routes is much greater than that of the six days. Therefore now to weigh for Sundays as well as other days and to divide by seven, is the fairest single rule that can be found.

But it is said that when an average is directed to be reached by weighing for say thirty working days it is implied that you are to get the average by using the number of working days on which the mails were weighed as a divisor, that working days mean week days, and that if in fact Sundays are used as working days, the divisor is not affected because the statute only contemplated six for a week. But the supposed implication of the statute disappears when it is remembered that the average wanted is not the average for the weighing days only but the average for the year. It is plain too that, whether "working-days" be read to mean week days or the days on which work was done in fact, the statute contemplates the working days and the weighing days as identical and therefore affords no ground for demanding the advantage of a dividend of seven and a divisor of six, which is what the railroads want.

Various make-weights are thrown in to help the construction desired by the roads but they seem to us insufficient to change the result that is reached by reading the words. It is said that down to 1907 the Post Office Department construed the Acts of 1873 and after as entitling the railroads to the maximum rates for full service as defined and to the minimum divisors and that this construction must be taken to have been adopted in silence, by the later statutes. But the exercise of power in the way deemed just while the conditions stated to have existed in and after 1873 continued was not a construction but the exercise of discretion in determining the amount of pay—a discretion which, as we have seen, undeniably was given in the form of a right to regulate

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rates, and which therefore there could be no reason for withholding, beyond the express words of the act, at the other end. It is true that in 1884 an Assistant Attorney General gave an opinion that any departure from the practice would defeat the intention of the law and cause no little embarrassment and that thereafter an order made by a previous Postmaster General for taking the number of weighing days as the divisor was revoked. But the letter of the Postmaster General thus answered merely stated what had been the practice as to the divisor and asked whether it was in violation of law. It did not state that the Post Office considered itself bound to follow that way. The order that was revoked only purported to affect seven-day routes and is of little or no importance to the question before us now.

It is said that the rate was fixed by the Act of March 2, 1907, c. 2513, 34 Stat. 1205, 1212, if not before, by a reduction to "five per centum less than the present rates" on certain routes. But as we have stated we understand this to mean a reduction of the rates fixed by statute, that is the maximum rates. We do not understand it to refer to rates specifically allowed. It is not likely that Congress considered the latter in detail.

Finally much is made of the fact that before the passage of the Act of March 3, 1905, and again before the passage of the Act of March 2, 1907, provisos were stricken out that in effect required the divisor to be the number of the weighing days. A similar thing happened before the passage of the act making appropriations for the fiscal year ending June 30, 1909. We do not go into the particulars of these matters because whatever may have been said by individuals the provisos might as well have been rejected for the purpose of leaving the choice between the two divisors to the judgment of the Postmaster General as for any other reason. On the other hand we are not disposed to lay much stress on the fact

that the appropriations by Congress accepted the Postmaster General's estimates even when it had been notified that the railroads were dissatisfied with Order No. 412. The Act of March 3, 1875, c. 128, 18 Stat. 340, 341, ordered the Postmaster General to have the weighing done thereafter by the employees of the Post Office Department, and to "have the weights stated and verified to him by said employees under such instructions as he may consider just to the Post-Office Department and the railroad-companies." Possibly this might be construed to recognize the power now in dispute but this suggestion also we are content to leave on one side. We also leave unconsidered the great difficulties that the railroads encounter in the effort to show that their conduct did not amount to an acceptance of the Postmaster General's terms within the decision in *New York, New Haven & Hartford R. R. Co. v. United States*, ante, 123. The construction of the statutes disposes of all the cases without the need of going into further details.

Judgments affirmed.

MR. JUSTICE DAY and MR. JUSTICE VAN DEVANTER dissent. MR. JUSTICE McREYNOLDS took no part in the decision of the cases.

MR. JUSTICE PITNEY, with whom concurred MR. JUSTICE McKENNA.

I concur in the affirmance of the judgments of the Court of Claims in these cases, but upon grounds somewhat different from those expressed in the opinion of Mr. Justice Holmes.

All the claims arose under the law as it stood after the Act of March 2, 1907, c. 2513, 34 Stat. 1205, 1212, and before that of July 28, 1916, c. 261, 39 Stat. 412, 429, by which the carriage of mail matter by the railways was made compulsory. The act about which the prin-

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cial controversy turns is that of March 3, 1873, c. 231, 17 Stat. 556, 558, the disputed portion of which was carried into § 4002, Rev. Stats. By it the Postmaster General was "authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad-routes upon the conditions and at the rates hereinafter mentioned: . . . Second, That the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars; . . . five thousand pounds, two hundred dollars, and twenty-five dollars additional for every additional two thousand pounds, the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working-days, not less than thirty, at such times . . . and not less frequently than once in every four years, and the result to be stated and verified in such form and manner, as the Postmaster-General may direct."

In my opinion, the rates of pay per mile per annum were maximum rates, and the Postmaster-General had a discretion to contract at less if the railroads agreed; but under § 210 of the Act of June 8, 1872, c. 335, 17 Stat. 283, 309; Rev. Stats., § 3997, he was under a duty to arrange the routes into classes according to the size of the mail, and the speed, frequency, and importance of the service, "so that each railway company shall receive, as far as practicable, a proportionate and just rate of compensation, according to the service performed."

But I think that in the clause "the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working-days, not less than thirty," etc., the words "*successive working-days*," by proper interpretation, mean successive week days; and since the aggregate weight for the weighing period must be subjected to division in order to ascertain the

average weight per day, it naturally follows that the divisor should be the same number of "working-days" (that is, week days) that are included in the period. The previous history of the mail service shows abundant reason for this, and for more than thirty years thereafter the provision was uniformly so construed by the Department. Upon a large number of the railway routes, mails were carried six days each week, none being carried on Sunday; while on other routes they were carried on every day in the week. The aggregate weight of mails carried was not affected by the frequency of the service, since the six-day routes carried the Sunday accumulations on Mondays. This explains why a certain number of "working-days" (week days) was made the measure of the weighing period, and at the same time shows that the week-day divisor was necessary in order to deal equitably with both the six-day and the seven-day routes. From the passage of the Act of 1873 down to the promulgation of Order No. 412 in the year 1907, the practice of the Department was in accord with the above interpretation. It was explained in a communication from the Postmaster General to the Senate January 21, 1885, Senate Ex. Doc. No. 40, 48th Cong., 2d sess., p. 68: "The present rule is, on those roads carrying the mails six times a week, to weigh the mails on thirty consecutive days on which the mails are carried, which would cover a period of thirty-five days; dividing the aggregate thirty weighings by thirty will give the daily average. On those roads carrying the mails seven times per week the weighing is done for thirty-five consecutive days (including Sundays) and the aggregate divided by thirty for a basis of pay. It is evident that the period during which the weighing is continued covers, in both cases, all the mails carried for thirty-five days. If, in the second case, we should take our basis from an average obtained by dividing the aggregate weight by thirty-five we should commit the absurdity of putting a

premium upon inefficiency, for evidently if the Sunday train were cut off we should virtually have the same mails less frequently carried, and therefore with a higher daily average, and therefore a higher pay basis than in the case where the seventh train was run and the greater accommodation rendered. The present method gives no additional pay for the additional seventh train, but the other method would cause a reduction on account of better service, and practically would operate as a fine on all those roads carrying the mails daily, including Sunday."

The Act of March 3, 1905, c. 1480, 33 Stat. 1082, 1088, changed the minimum weighing period so as to require the inclusion of at least ninety, instead of thirty, successive working days, but made no other change. Under this act one hundred and five calendar days necessarily were included in the weighing period in order to take in ninety successive working days. In my opinion, this act, like that of 1873, by fair construction, required that the week-day divisor be employed. And so it was officially construed, until 1907.

But while I regard this method of determining the average weight to have been prescribed, and not left to the discretion of the Postmaster General, still I think the statute in this respect was only directory, and not mandatory. Considering the provision in its relation to the context and subject-matter, it will be seen to be but an aid to the making of fair contracts within the maximum rates allowed, and an aid to the Postmaster General in fixing the rate of compensation upon land-grant routes, and in so arranging routes that each railway company shall receive a proportionate and just rate of compensation according to the service performed. Hence, it seems to me that a failure strictly to comply with the prescribed method of ascertaining the average weight did not of itself render the action of the Postmaster General *ultra vires* and void.

The principal controversy in the present cases is over his Order No. 412 (June 7, 1907), which provided "That when the weight of mail is taken on railroad routes the whole number of days included in the weighing period shall be used as a divisor for obtaining the average weight per day." While I regard it as embodying an erroneous view of the statute, this is not sufficient, in my opinion, to vitiate a contract voluntarily made by a railway mail carrier based upon a calculation of average weight made and known to have been made in conformity with the order. All the present claims originated after the promulgation of the order, and arose out of the carriage of mails under arrangements made with the Postmaster General after express notice of its provisions.

It is contended that although the Act of 1873 (Rev. Stats., § 4002), in providing that the pay per mile per annum should "not exceed" the specified rates, conferred upon the Postmaster General a discretion to pay less rates, this was modified by the language of the Act of July 12, 1876, c. 179, 19 Stat. 78, 79, which reduced the compensation ten per centum from "*the rates fixed and allowed* [by the Act of 1873] for the transportation of mails on the basis of the average weight"; by that of the Act of June 17, 1878, c. 259, 20 Stat. 140, 142, where, however, the expression is: "by reducing the compensation to all railroad companies for the transportation of mails five per centum per annum from the rates for the transportation of mails, *on the basis of the average weight fixed and allowed*," etc.; or by the provision of the Act of March 2, 1907, c. 2513, 34 Stat. 1205, 1212, readjusting compensation on railroad routes carrying an average weight per day exceeding five thousand pounds, "by making the following changes in the present rates per mile per annum for the transportation of mail on such routes, and *hereafter the rates on such routes shall be as follows*," etc. I am not convinced that these amendments, or any of them, had

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the effect of impliedly repealing that part of the Act of 1873 (Rev. Stats., § 4002)—“shall not exceed,” etc.—from which alone, in my view, the Postmaster General derived any serviceable discretion about readjusting the compensation.

Therefore, he still had liberty of action within the maximum rates prescribed. And the railroad companies, other than such as had been aided by grants of lands or otherwise, were free to carry the mails at rates offered, or refuse them, as they chose. *Eastern R. R. Co. v. United States*, 129 U. S. 391, 396; *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 225 U. S. 640, 650; *Delaware, Lackawanna & Western R. R. Co. v. United States*, 249 U. S. 385, 388; *New York, New Haven & Hartford R. R. Co. v. United States*, ante, 123.

Furthermore, by § 212 of the Act of June 8, 1872, c. 335, 17 Stat. 283, 309; Rev. Stats., § 3999, if because of the refusal of the railway companies, the Postmaster General was unable to make contracts at a compensation “not exceeding the maximum rates,” or for what he deemed a reasonable and fair compensation, he was at liberty to use other means of carriage.

From the findings of the Court of Claims it appears that in all of these cases there were express contracts; and I concur in the view of that court (53 Ct. Clms. 258, 308, 315, 318, 319) that the contracts arose not out of the Distance Circular, in which the Postmaster General specially called notice to Order No. 412, and to which some of the claimants responded with protests, more or less explicit, that they would not be bound by that order; but arose out of what subsequently happened. The Postmaster General in every case informed the protesting carriers that he would not enter into contract with any railroad company excepting it from the operation of any postal law or regulation. The mails were weighed and the average weight ascertained in accordance with Order No.

412, as all the claimants had been notified would be done; thereafter the Postmaster General, upon the basis of the weight thus ascertained, caused the maximum statutory rate to be calculated, issued orders naming certain amounts thus arrived at as the compensation for the service, and gave notice in proper form to the carriers specifying in terms the readjusted pay that would be allowed, "subject to future orders and to fines and deductions." Thereafter the carriers received and transported the mails as offered, periodically accepted compensation in accordance with the readjustment notices, and proceeded thus without further objection or protest until the end of the respective quadrennial periods. In short, although in some cases they declared they would not consent to the ascertainment of average weights on the basis of Order No. 412, they did not insist upon their objection in the face of the Postmaster General's declaration that he would not accede to it. Had they refused to carry the mails on the terms proposed, he might have exercised his discretion as to the rate of pay per mile, so that instead of agreeing to give them, as he did, the maximum pay based on the average weight ascertained under Order No. 412, he might have acceded to their contention by employing the week-day divisor, but have carried into effect his own view as to the amount that ought to be allowed by reducing the rate of pay per mile. Or, as already shown, he might have refused to make the contracts and have proceeded under § 3999.

I deem it clear, therefore, that the claimants in fact accepted the Postmaster General's offers as contained in the readjustment notices, by proceeding to perform the prescribed service in accordance therewith and accepting the compensation due to them therefor. And so the Court of Claims held (53 Ct. Clms. 258, 308, 313, 315, 318, 319).

Some of the routes of the Seaboard Air Line and of the Northern Pacific Railway Company were over lines that had been aided by government land grants, and hence

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were subject to provisions of law summed up in § 214 of the Act of June 8, 1872; Rev. Stats., § 4001, by which they were obliged to "carry the mail at such prices as Congress may by law provide; and, until such price is fixed by law, the Postmaster-General may fix the rate of compensation." The Seaboard Air Line makes no point of this; but in behalf of the Northern Pacific it is contended that claimant, not being in the position of a free agent, ought not to be regarded as having voluntarily accepted the terms proposed by the Postmaster General. But the effect of the findings is that it did so accept; and this result can not be overturned by raising an argument about the circumstances that went to make up the evidence upon which the findings were based; and the present contention amounts to no more than this.

Were it otherwise, nevertheless it appears that Congress had not provided the compensation for the land-grant routes, except that it had authorized and directed the Postmaster General to readjust all railway mail pay in the manner set forth in § 4002 and within the maxima prescribed therein and in the amendatory Acts of 1876, 1878 and 1907, above mentioned, and had provided by § 13 of the Act of July 12, 1876, c. 179, 19 Stat. 78, 82, "That rail-road-companies whose railroad was constructed in whole or in part by a land-grant made by Congress on the condition that the mails should be transported over their road at such price as Congress should by law direct shall receive only eighty per centum of the compensation authorized by this act," besides other legislation concerning the land-grant routes that may be referred to but need not be recited. Acts of March 2, 1907, c. 2513, 34 Stat. 1205, 1212; May 12, 1910, c. 230, 36 Stat. 355, 362; July 28, 1916, c. 261, 39 Stat. 412, 426. Assuming, therefore, that there was no contract affecting the land-grant lines of the Northern Pacific, their compensation must be at the rate fixed by the Postmaster General in the exercise

of the power and discretion conferred upon him by this legislation; and so long as he exercised this power and discretion reasonably, not fixing a non-compensatory rate or otherwise acting arbitrarily, the carrier was concluded by his action. There is no finding that he acted arbitrarily; on the contrary, he had in support of Order No. 412 a considered opinion of the Attorney General under date September 27, 1907 (26 Ops. Atty. Gen. 390); and, so far as appears, he treated the land-grant routes like others, not reducing them below the eighty per centum contemplated by § 13 of the Act of 1876, or otherwise violating the statutes. There is no finding nor any contention that the amounts allowed them were not compensatory; and, upon the whole, it seems to me that although he erred in failing to apply the week-day divisor to the weighings, this did not render the readjustment based thereon wholly void, or permit the carrier, after transporting the mails and accepting the stated compensation without further objection, afterwards to treat the readjustment orders as nullities.

MR. JUSTICE MCKENNA concurs in this opinion.
